84-1590

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No.

IN THE

Supreme Court of the United States

OCTOBER TERM, 1984

JAMES B. JENSEN, JR.; RICARDO S. TOMACRUZ; LEARJET PHILIPPINES, INC., a corporation; JAMES B. JENSEN & CO., INC., a corporation and HAMIX INTERNATIONAL, LTD., a corporation,

Petitioners,

v.

GATES LEARJET CORPORATION and GATES LEARJET EXPORT CORPORATION,

Respondents.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

RESPONDENTS' BRIEF IN OPPOSITION

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RULE 28.1 DISCLOSURE

Gates Corporation is the parent company of Gates Learjet Corporation and owns in excess of 50% of the outstanding common stock of Gates Learjet Corporation. Gates Learjet Export Corporation is a wholly owned subsidiary of Gates Learjet Corporation.

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Respondents, Gates Learjet Corporation and Gates Learjet Export Corporation, respectfully request that this Court deny the Petition for Writ of Certiorari, seeking review of the Ninth Circuit's opinion in this case. That opinion is reported at 743 F.2d 1325 and is attached hereto as Appendix A.

PARTIES

Petitioners' statement of the parties to the proceeding in the Ninth Circuit Court of Appeals is incorrect. However, the caption of the case in this Court contains the names of all such parties.

JURISDICTION OF THIS COURT

Contrary to Petitioners' statement as to this Court's jurisdiction to review the decision of the Ninth Circuit Court of Appeals, jurisdiction in such circumstances is governed by 28 U.S.C. § 1254.

STATEMENT OF THE CASE

Gates Learjet Corporation is the manufacturer of executive aircraft known as Learjets. Gates Learjet Export Corporation is a wholly owned subsidiary engaged in international marketing. They will be referred to collectively as "Gates". A large part of the production, administration and distribution occurs in Tucson, Arizona.

James B. Jensen, Jr. ("Jensen") is a United States citizen with residence in California and the Philippines. Ricardo S. Tomacruz ("Tomacruz") is a citizen and resident of the Philippines. Learjet Philippines, Inc. ("LPI") is a Philippine corporation. James B. Jensen & Co., Inc. ("Jensen Inc.") is a California corporation whose principal place of business is San Francisco, California. Hamix International, Ltd. ("Hamix") is a non-resident foreign corporation whose principal place of business is Hong Kong, British Crown Colony. There is substantial evidence that the corporations are mere conduits/alter egos for each other and Jensen and Tomacruz. Respondents' Appendix B. *See also,* Petitioners' Appendix 5.

Jensen is the President of both Jensen, Inc. and LPI. In February of 1978, Jensen travelled to Tucson, Arizona to be on hand when a purchaser accepted delivery of a jet manufactured by Gates. During this visit, Jensen

solicited from Gates the opportunity to become the Learjet distributor in the Republic of the Philippines. Negotiations with regard to this International Distributorship Agreement occurred while Jensen was in Tucson, Arizona, and by telephone, correspondence, and telex from Tucson to San Francisco and Manila.

An International Distributorship Agreement was ultimately entered into between Gates and LPI. This Agreement provides that:

> "It is expressly agreed and understood that this Agreement is an Arizona agreement and that it shall be governed by the laws of the State of Arizona of the United States of America in all matters, including, but not limited to, validity, obligation, interpretation, construction, performance and termination."

The first Agreement was entered into in 1978 for a period of one year or a part thereof, and was in fact renewed for two additional years and finally extended by letter agreement for a period of an additional four months.

During the terms of the Agreements, Jensen and Tomacruz made numerous trips to Arizona on behalf of LPI. Jensen came to Tucson at least seven times between February of 1978 and September of 1981. Among the other contacts, Jensen attended and participated in Gates' annual distributor conferences held in Tucson in 1978, 1979 and 1980. On various other occasions during 1978, 1979 and 1980, Jensen dealt with various Gates personnel at Gates' marketing headquarters and the manufacturing plants located at the Tucson International Airport in Tucson, Arizona. These dealings

were for the purpose of negotiating the purchase of Learjet aircraft, for the purpose of accepting delivery of such aircraft, or for the purpose of negotiating terms and conditions under which Jensen and his company would continue to serve as a Gates Learjet distributor.

During the term of the Agreement, LPI and its principals, Jensen and Tomacruz, entered into numerous Airplane Purchase Agreements with Gates in Tucson. Each of these Airplane Purchase Agreements contains a provision stating that:

> "This Agreement shall be construed in accordance with and its performance shall be governed by the laws of the State of Arizona. The courts of Arizona shall have exclusive jurisdiction to hear and determine all claims, disputes, actions or suits which may arise hereunder."

Delivery of these airplanes occurred in Tucson, Arizona, with Jensen and/or Tomacruz in attendance.

LPI, Jensen and Tomacruz purchased quantities of spare parts from Gates. These purchases totalled over $200,000.00 for 1980 and 1981 combined.

Additionally, numerous letters, telexes and telephone calls went back and forth between Gates in Tucson and LPI, Jensen and Tomacruz in the Philippines and/or San Francisco.

Gates changed emphasis with its distributors from quota sales to service in 1981, after first so advising all distributors in September of 1980 at an Executive Business Jet national convention.

LPI, as well as all other distributors, was advised to create and maintain service capability. LPI, contrary to requests, never obtained its own hangar, mechanics or tools in its area of distributorship (Manila).

In June, July and August of 1981, written communications and discussions in Tucson took place between Gates and LPI. LPI adopted the position that its borrowed hangar space, borrowed tools and borrowed mechanics enabled it to provide adequate service. In September of 1981, Gates made a tentative decision not to renew LPI's Distributorship Agreement. This decision was finalized on October 15, 1981, by letter to LPI. LPI was one of several distributors not to have its distributorship renewed in 1981.

On October 29, 1981, Gates sent a potential Philippines customer a letter saying Gates would have a demonstration of an executive business jet in Manila, Philippines, in November of 1981.

Gates sent a Learjet to Manila on November 28, 1981, with its far eastern sales representative and two pilots. LPI, upon learning of the demonstration, caused a criminal complaint to be filed against Gates' representative for not having a Philippine business license. As a result, the sales representative was arrested and the jet impounded. As Gates was having the sales representative freed and jet released, LPI filed a lawsuit which further detained the employee and the aircraft. Gates obtained the release of its far eastern representatative on Christmas Eve, 1981.

LPI continued to use the tradename and trademark of Learjet after notice of non-renewal of their

distributorship. The Distributorship Agreement forbids such continued use.

On February 3, 1982, Gates filed a four count complaint in the Pima County Superior Court of the State of Arizona. Defendants in the complaint are LPI and related companies and individuals: Jensen, Tomacruz, Jensen Inc. and Hamix (hereinafter collectively referred to as "Petitioners"). Count One of the complaint alleges unauthorized use of Gates' tradenames and trademarks by all of the Defendants, in violation of Distributorship Agreement, after non-renewal of the Agreement. Count Two is against Jensen and Tomacruz for abuse of process arising out of the seizure by Philippine authorities of an aircraft owned by Gates and the jailing of the Gates employee. Count Three alleges that Jensen and Tomacruz interfered with contractual relations between Gates and customers in the Philippines. Count Four alleges conspiracy by all Defendants to make unauthorized use of Gates' trademark and tradename.

A petition for removal of the action was filed by Jensen and Jensen Inc. The removal was based upon diversity of citizenship.

Jensen and Tomacruz answered and later filed an Amended Counterclaim in six Counts. The Counterclaim added three new parties to the litigation as counter-defendants: B. S. Stillwell, Jane Doe Stillwell, ("Stillwell") and Stillwell Aviation Australia, Pty., Ltd. ("Stillwell Aviation").

On June 30, 1982, Jensen Inc. filed a Motion to Dismiss the complaint for lack of jurisdiction over the person. On September 23, 1982 the United States District

Court (Marquez, J) entered an order denying Jensen Inc.'s Motion as to Counts One and Four of the complaint and granting the Motion as to Counts Two and Three.

On April 20, 1983, the remaining Defendants moved the court to clarify that Counts Two and Three were dismissed as to all Defendants because of lack of jurisdiction over their persons. On May 31, 1983 the United States District Court "clarified" its order of September 23, 1982 to reflect that Counts Two and Three were dismissed as to all parties named in those Counts. Gates appealed from that ruling.

The second issue on appeal involved the District Court's dismissal of Counts One and Four of the complaint under the doctrine of forum non conveniens. Petitioners did not challenge the convenience of the forum until October 5, 1983, after 18 months of discovery and trial preparation. Gates filed an Opposition to the Motion to Dismiss on October 12, 1983. In a "Memorandum of Decision and Order", dated November 1, 1983, the Court dismissed the complaint, subject to certain conditions.

A Notice of Appeal as to both issues was filed on November 30, 1983. On September 27, 1984, the United States Court of Appeals, Ninth Circuit, reversed both of these rulings and remanded the action to the District Court for further proceedings. On November 27, 1984, a Petition for Rehearing and Rehearing in Banc was denied.

REASONS WHY THE WRIT SHOULD BE DENIED

I. There are no special or important reasons for granting review on the Writ of Certiorari.

The decision of the Ninth Circuit presents no unique, special or important issues with which to deal. There is no conflict between Federal Courts of Appeals, there is no important question of federal law, nor is there any particularly significant issue to be resolved. The opinion of the Ninth Circuit dealt with two topics: personal jurisdiction and forum non conveniens dismissals.

As to the former, inquiries into the existence or non-existence of personal jurisdiction require case by case determinations which turn on the peculiar facts of each action. There is nothing special about this case which would allow this Court to clarify the law in an area, resolve a conflict, etc.

Contrary to Petitioners' contention, the case of *Helicopteros Nacionales de Columbia v. Hall*, ____ U.S. ____, 80 L.Ed.2d 404, 104 S. Ct. 1868 (1984) is not factually similar to the instant case. Neither does it "leave unanswered" a legal question which this case will allow this Court to resolve. Specifically, *Helicopteros Nacionales* is a wrongful death action arising out of a helicopter crash in Peru brought by the survivors of a United States citizen against a Columbian corporation. Substantial and significant factual differences exist between that case and the case at bar which render them inapposite. For example, a wrongful death action involves negligence, rather than intentional acts, which are involved in the present case. Additionally, the action in *Helicopteros Nacionales* did not arise out of a forum-related contract. There was a contract tangentially involved, but it was executed in Columbia not the United States. Indeed, both parties in the *Helicopteros Nacionales* case conceded that the action did not arise out of that contract.

Finally, and most importantly, Petitioners misrepresent, and misstate by selective quotes, the "unanswered question" in the *Helicopteros Nacionales* case, *id.* at fn.10. Petitioners seem to suggest that the *Helicopteros Nacionales* case left open the question of whether a state could exercise "specific jurisdiction" over a defendant in a suit arising out of or related to the defendant's contacts with the forum. In fact, this Court in *Helicopteros Nacionales* tacitly recognized and accepted such a status and stated:

> "When a controversy is related to or 'arises out of' a defendant's contacts with the forum, the court has said that a 'relationship among the defendant, the forum, and the litigation' is the essential foundation of in personam jurisdiction." *Id.* at ____, 80 L.Ed.2d at 411, 104 S. Ct. at 1873, Citing to footnote 8.

Footnote 8 reads:

> 'It has been said that when a state exercises personal jurisdiction over a defendant in a suit arising out of or related to the defendant's contacts with the forum, the state is exercising specific jurisdiction over the defendant." (Citations omitted). *Id.*

Additionally, the general jurisdiction/specific jurisdiction distinction was acknowledged in *Keeton v. Hustler Magazine, Inc.*, ____ U.S. ____, 79 L.Ed.2d 790, 104 S.Ct. 1473 (1984) wherein the Court stated:

> "In the instant case, respondent's activities in the forum may not be so substantial as to support jurisdiction over a cause of action unrelated to those activities. But respondent is carrying on a 'part of its general business' in New Hampshire, and that

> is sufficient to support jurisdiction when the cause of action arises out of the very activity being conducted, in part, in New Hampshire." *Id.* at ____, 79 L.Ed.2d at 801, 104 S.Ct. 1473

The answered question referred to in footnote 10 of *Helicopteros Nacionales* is not whether there is a distinction between general and specific jurisdiction, but rather "whether the terms 'arising out of' and 'related to' describe different connections between a cause of action and a defendant's contacts with the forum" for the purposes of exercising specific jurisdiction. (This particular section of footnote 10 was deleted by Petitioners and an elipses substituted). Thus, rather than not deciding whether specific jurisdiction (or "limited jurisdiction" as the Ninth Circuit labels it) exists as a concept, this Court simply left open a sub-issue of that inquiry. That sub-issue is not raised in the current case.

As to the forum non conveniens issue, the Ninth Circuit Court of Appeals reversed the District Court's dismissal of the remaining counts of the complaint, Counts One and Four. The District Court desired that these Counts be tried in the Philippines. This ruling also presents no unique or important matters of law for this Court to address. If the case goes on to trial in Tucson, as currently planned, Petitioners will incur no real prejudice because there is nothing wrong or unfair about Tucson as a forum. Petitioners have never questioned their ability to get a fair trial in Tucson, so justice can ultimately be obtained in that location. Additionally, there is no absolute right to a change of forum for convenience sake. Since it is a discretionary matter, Petitioners' inability to obtain a different forum does not impact any of its "rights", nor is it violative of due process.

Finally, one of the thrusts of Petitioners' argument regarding forum non conveniens is that the Court of Appeals did not consider the effect of bringing Counts Two and Three back into the case when it reviewed the propriety of the forum non conveniens dismissal of Counts One and Four. Petitioners contend that, when the aggregation of all four counts is considered, it is clear that the Philippines is the more appropriate forum for the entire case. However, it is not for an Appellate Court to make that inquiry. The question has never been decided by the District Court and, until it has, appellate review is premature and improper.

II. The decision of the Ninth Circuit was correct.

A. Arizona has personal jurisdiction over LPI, Jensen and Tomacruz as to Count Two of the Complaint, and personal jurisdiction over Jensen and Tomacruz as to Count Three of the Complaint.

The Ninth Circuit opinion reveals a well reasoned discussion of the specific facts of this case and a proper application of the prevailing law on personal jurisdiction to those facts. The decision of the District Court dismissing Counts Two and Three of the complaint on personal jurisdiction grounds was properly reversed.

Petitioner contends that there is some infirmity with the opinion of the Court of Appeals because it focuses only on the forum-related contacts of "Learjet Philippines, Inc. (by and through petitioners Jensen and Tomacruz) . . . Yet it reversed the dismissal of Counts II and III as to all defendants." Writ of Certioriari, page 12. This argument fails to recognize that Counts Two and Three only involve LPI, Jensen and Tomacruz (Count Two is against all three of these parties and Count Three is only against Jensen and Tomacruz).

Contrary to Petitioners' assertion, there was a plethora of evidence regarding the contacts these parties had with the forum state of Arizona. A number of these contacts are enumerated in the Court of Appeals decision. Petitioners' outline of their contacts with Arizona contained at pages 12-14 of the writ is misleading and inaccurate. For example, as to Jensen, Inc., Petitioners claim that the only evidence of contact was that Jensen, Inc. purchased spare parts from Gates in Wichita, Kansas and relayed LPI's mail through its San Francisco office. However, it is readily apparent from a review of the facts that Jensen, on behalf of Jensen, Inc., transacted business in the state of Arizona and that Jensen, Inc. and LPI were used by Jensen interchangeably with a total disregard of their separate corporate entities. *See* Appendix B. Even the District Court, when it dismissed Counts Two and Three, spent several pages examining the forum-related conduct of Jensen, Inc. and concluded that:

> "The distributorship agreement was entered into only after lengthy and thorough negotiation process, during which Jensen, Inc., through its president, participated fully . . . . Jensen, Inc. aggressively solicited the distributorship contract, conducting a well-planned and persuasive promotional campaign to secure the distributorship from GLC. Defendant, therefore, 'purposely availed himself of the privilege of conducting' its working relationship with GLC within Arizona, not only in person, but through the mail, telephone and wire services." Petitioners' Appendix No. 5 at pages 8 and 9.

The District Court in that Order also concluded that "Jensen, Inc. is an active member in the marketing activity which is the subject matter of the distributorship

agreement." *Id.* at page 5. Because Petitioners' description of forum related activities varies widely from the facts, it is respectfully requested that this Court rely upon the jurisdictional facts as outlined in the decision of the Court of Appeals and in the Statement of Facts contained herein.

Petitioners also contend that jurisdiction over Jensen and Tomacruz is based upon the conduct of LPI, and that such exercise is unfair, citing *Russ v. Savchuk,* 444 U.S. 320, 62 L.Ed.2d 516, 100 S.Ct. 571 (1980) and *Powder Horn Nursery, Inc. v. Soil and Plant Laboratory, Inc.,* 20 Ariz.App. 517, 514 P.2d 270 (1973). However, these cases are inapposite both factually and legally. *Russ v. Savchuk* involved an attempt by a party injured in an automobile accident to obtain jurisdiction over the tortfeasor, over whom there was otherwise no personal jurisdiction, by garnishing the tortfeasor's insurance company, which did business in the forum. Obviously, that case has no relevance here. In *Powder Horn Nursery, Inc.,* the plaintiff was seeking to obtain jurisdiction over corporate employees whose only involvement was in their capacity as employees of the defendant corporation. The Court noted that there was nothing to indicate that the defendant corporate entity was used as a sham or in any manner which would justify disregarding its existence. The Court also observed that none of the individual defendants had conducted activities in Arizona. In the present case, the individuals are being sued

for their actions as individuals[1], allegations have been made and evidence produced indicating that the corporate entities are a sham, and the individual Petitioners themselves conducted activities in Arizona. It should be noted that this Court recently rejected the suggestion that corporate employees who act in their official capacity are somehow shielded from suit in their individual capacity. *Calder v. Jones*, ____ U.S. ____, 79 L.Ed.2d 804, 104 S.Ct. 1482 (1984). The Petitioners are correct that their contacts with Arizona are not to be judged according to their employers' activities there. "On the other hand, their status as employees does not somehow insulate them from jurisdiction." *Id.* at ____, 79 L.Ed.2d at 813, 104 S.Ct. 1482.

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[1] Petitioners seem to suggest that Jensen and Tomacruz would not be subject to personal liability because they can hide behind the corporate shields of Jensen, Inc. and LPI. There are two problems with this argument. The first is that there is an allegation that the corporate form should be disregarded and the corporate veil should be pierced. Secondly, Jensen and Tomacruz are officers of Learjet Philippines and Jensen is an officer of Jensen Inc. Corporate officers are individually liable for torts which they personally commit and they cannot shield themselves behind the corporation when they are actual participants in the tort. *Solo Cup Company v. Paper Machinery Corp.*, 359 F.2d 754, 760 (7th Cir. 1966). The principal applies where the conduct constitutes unauthorized use of tradenames and trademarks; *Mead Johnson & Co. v. Baby's Formula Service, Inc.*, 402 F.2d 19, 23 (5th Cir. 1968); *Steak & Brew, Inc. v. Makins*, 177 U.S.P.Q. 412 (D. Conn. 1963); or abuse of process/false imprisonment/malicious prosecution. *Burke v. Musarra*, 46 Misc.2d 933, 261 N.Y.S.2d 314 (1965); *Freides v. Sani-Mode Manufacturing Co.*, 33 Ill.2d 291, 211 N.E.2d 296 (1965). Thus, Jensen and Tomacruz's wrongful conduct subjects them to personal liability and, since they personally have sufficient contact with Arizona, personal jurisdiction.

Petitioners' also question the Court of Appeals' conclusion that the dismissed Counts "arise out of" the distributorship agreement. The Petitioners particularly impugn such a decision as to Count Two of the complaint (abuse of process). However, the Court of Appeals examined the complaint in the Philippines upon which the abuse of process count is based and duly noted that all three counts of that action seek various damages as a result of Gates' non-renewal of the Distributorship Agreement. Clearer evidence that the abuse of process arose out of the agreement is hard to imagine.

Petitioners final contention of error with regard to the Ninth Circuit's decision on personal jurisdiction is that a recent case, *Helicopteros Nacionales, supra,* is supportive of a contrary decision. However, by its explicit terms, the *Helicopteros Nacionales* decision was limited to the issue of whether *general jurisdiction* existed over the Columbian defendant, it being conceded that specific or limited jurisdiction did not apply. In the case at hand, the Court of Appeals ruled in Petitioners' favor on the issue of general jurisdiction. Thus, *Helicopteros Nacionales* has no application to this case in its current posture.

In addition to the numerous forum related contacts, another aspect of this case which makes exercise of jurisdiction particularly reasonable, as the Court of Appeals noted, is the fact that Petitioners would still have to litigate Counts One and Four of the complaint and their Six Count Counterclaim. With all those issues remaining, the addition of two more counts is not unduly burdensome.

It is clear from the foregoing that the Court of Ap-

peals decision with regard to personal jurisdiction was well reasoned and should stand as a legitimate application of the specific facts to the applicable law. Review is inappropriate.

B. The Court of Appeals properly concluded that the District Court abused its discretion in granting the forum non conveniens dismissal.

The Court of Appeals properly applied the abuse of discretion standard in reversing the District Court. In establishing the abuse of discretion standard, this Court noted that:

> "[W]here the court has considered all relevant public and private interest factors, and where its balancing of these factors is reasonable, its decision deserves substantial deference."

Piper Aircraft Co. v. Reyno, 454 U.S. 235, 257, 70 L.Ed.2d 419, 436, 102 S.Ct. 252 (1981). Thus, a District Court abuses its discretion, and is subject to reversal, when it does not consider all the relevant factors and/or where its balancing of these factors is unreasonable. *La Seguridad v. Transyt Line*, 707 F.2d 1304, 1308 (11th Cir. 1983). "Emphasis on the District Court's discretion . . . must not overshadow the central principle of the *Gilbert* doctrine that 'unless the balance is strongly in favor of the defendant, the plaintiff's choice of forum should rarely be disturbed.'" *Manu International, S.A. v. Avon Products, Inc.*, 641 F.2d 62, 65 (2nd Cir. 1981) (quoting *Gulf Oil v. Gilbert*, 330 U.S. 501, 508, 67 S.Ct. 839, 843, 91 L.Ed 1055, 1062 (1947)).

In analyzing the District Court's consideration of the private interest factors, the Court of Appeals ob-

served that the District Court totally failed to examine at least two important factors. First, the District Court did not recognize or consider in its balancing that Gates is a United States citizen and a resident of Arizona. The second relevant private interest factor that the District Court failed to examine was that the parties were ready for trial when the Court dismissed the complaint for forum non conveniens. A prompt trial of the case in Arizona would have been more "easy,, expeditious and inexpensive" than trial in the Philippines.

In addition to not considering at all the two aforementioned factors, the District Court did not properly consider and weigh the private interest factor of location of witnesses. Specifically, the District Court mischaracterized where the balance of the witnesses were located and incorrectly emphasized the number, rather than the materiality, of the witnesses.[2]

As to the public interest factors, the Court of Appeals concluded that the District Court failed to consider one such factor, was mistaken as to another and unreasonably overemphasized a third. Specifically, the District Court totally failed to weigh Arizona's interest in having the controversy resolved at home. The District Court also mistakenly concluded that both Philippine and Arizona law would apply to the matter, when in fact only Arizona law would apply. The only remaining Counts of the complaint involved unauthorized use of tradenames and trademarks in violation of the Distributorship

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[2] Petitioners have to this day failed to identify a single Philippine witness who they would like to utilize whose testimony would be unavailable in Tucson, let alone identify the content, necessity or materiality of that testimony.

Agreement. As previously noted, the Distributorship Agreement specifically provides that it shall be governed by Arizona law. Indeed, contrary to their assertion in their petition, Petitioners conceded that Arizona law would apply to these Counts. This occurred in Petitioners' Reply Memorandum Regarding the Motion to Dismiss for Forum Non Conveniens at page 4, line 6-8:

> "Defendant/Counterclaimants do not disagree that Arizona law applies to at least one of the plaintiffs' claims (the breach of contract)." Appendix C.

The Court of Appeals also concluded that the District Court overemphasized its own crowded docket in dismissing the action. The Court of Appeals correctly observed that it is unreasonable and unfair for a court to subject a United States corporation to the courts of another country merely because the plaintiff's home country's courts are congested.

In conclusion, the Court of Appeals held that the District Court failed to consider relevant private and public interest factors and unreasonably misconstrued others. The District Court therefore abused its discretion and the case was properly reversed and remanded for further proceedings.

CONCLUSION:

The Court of Appeals for the Ninth Circuit authored a very well reasoned opinion in a case that is peculiarly fact specific. This case offers no important matters of general interest nor any significant legal issues about which there is a conflict amongst the circuits, nor any issue which calls for action by the Supreme Court. Contrary to the contention of the petitioners, there is no

"unanswered question" in *Helicopteros Nacionales* that could be resolved by granting certiorari in this case. With regard to the forum non conveniens inquiry, the Court of Appeals properly applied an abuse of discretion standard, as enunciated by this Court for use in these specific situations, and concluded that such abuse occurred. Since a defendant has no absolute right to a forum non conveniens dismissal, an important right is not being affected. Finally, the ultimate forum, the Federal District Court in Tucson, Arizona, is a place where both sides can obtain a just and final result. The Petition for Writ of Certiorari should be denied.

Dated April 1, 1985.

By _____

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CERTIFICATE OF FILING AND SERVICE

STATE OF ARIZONA)
) ss.
COUNTY OF PIMA)

I, WILLIAM H. TINNEY, one of the attorneys for Respondents, and a member of the Bar of the Supreme Court of the United States, hereby certify that on this 1st day of April, 1985, 40 copies of Respondents' Brief in Opposition were mailed, postage prepaid, to the Clerk of the Supreme Court of the United States, within the time allowed for filing same.

I also certify that on this 1st day of April, 1985, 3 copies of the Respondents' Brief in Opposition were mailed, postage prepaid, to Herbert Mallamo and Gary F. Howard, 4041 North Central Avenue, Suite 2001, Phoenix, Arizona 85012, attorneys for the Petitioners.

I further certify that all parties required to be served have been served.

WILLIAM H. TINNEY

SUBSCRIBED AND SWORN to before me this 1st day of April, 1985 by William H. Tinney.

My Commission Expires:

Notary Public

APPENDIX

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APPENDIX A

UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

GATES LEARJET CORPORATION and GATES LEARJET EXPORT CORPORATION, *Plaintiffs/Appellants,* vs. JAMES B. JENSEN, JR.; RICARDO S. TOMACRUZ; LEARJET PHILIPPINES, INC., a corporation; JAMES B. JENSEN & CO., INC., a corporation, and HAMIX INTERNATIONAL, LTD., a corporation, *Defendants/Apellees.*	)	**No. 83-2643** **DC No. CIV 82-139** **OPINION**

APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE DISTRICT OF ARIZONA

ALFREDO C. MARQUEZ, DISTRICT JUDGE, PRESIDING

ARGUED AND SUBMITTED MAY 14, 1984

Before: CHOY, PREGERSON, and REINHARDT, Circuit Judges.

CHOY, Circuit Judge:

The issues on this appeal are (1) whether the district court properly dismissed counts two and three of appellant's complaint for lack of personal jurisdiction, and (2) whether the district court's dismissal of counts

one and four for *forum non conveniens* was an abuse of discretion. On both issues, we reverse and remand to the district court.

I. BACKGROUND

Gates Learjet Corporation and Gates Learjet Export Corporation ("Gates") entered into an international distributorship agreement with Learjet Philippines, Inc. ("LPI") in 1978. Gates, principally located in Tucson, Arizona, manufactures executive aircraft known as Learjets. LPI is a Philippine corporation. The original agreement was for a period of one year but was renewed for an additional two years and four months.

James B. Jensen, Jr., a United States citizen with residence in California and the Philippines, is the president of LPI and James B. Jensen & Co. ("Jensen, Inc."), a California corporation located in San Francisco. The negotiations for the international distributorship agreement occurred both in Tucson, when Jensen visited Gates, and by telephone, correspondence, and telex from Tucson to Manila and San Francisco. The agreement provides that it "is an Arizona agreement and that it shall be governed by the laws of the State of Arizona of the United States of America in all matters, included but not limited to, validity, obligation, interpretation, construction, performance and termination."

During the time the agreement was in effect, Jensen and Ricardo S. Tomacruz, the vice-president and general manager of LPI and a citizen and resident of the Philippines, made several trips to Tucson on behalf of LPI. The purposes of Jensen's visits, which numbered at least seven between February 1978 and September 1981, in-

cluded arrangement of an aircraft sale, meetings with Gates employees, and attendance at Gates' international distributor conference and the delivery of several airplanes. LPI also entered into several airplane purchase agreements with Gates in Tucson. Each agreement contained a choice of law provision specifying Arizona and a choice of forum provision that the "courts of Arizona shall have exclusive jurisdiction to hear and determine all claims, disputes, actions, or suits which may arise hereunder." In addition, LPI and Jensen, Inc. purchased over $200,000 in spare parts from Gates.

In 1981, Gates did not renew the international distributorship agreement with LPI. On February 3, 1982, Gates filed a four-count complaint in an Arizona state court against Jensen, Tomacruz, LPI, Jensen, Inc., and Hamix International Ltd., a Hong Kong corporation ("defendants"). Count one of the complaint alleges unauthorized use of Gates' tradenames and trademarks. Count two alleges abuse of process arising out of the seizure by Philippine authorities of a Gates' aircraft and the jailing of its pilot. Count three alleges interference with contractual relations between Gates and customers in the Philippines. Count four alleges a conspiracy to make unauthorized use of Gates' tradename and trademark. The action was removed to a federal district court for diversity of citizenship.

On September 23, 1982, the United States District Court for the District of Arizona dismissed counts two and three for lack of personal jurisdiction as to one of the defendants, Jensen, Inc. *Gates Learjet Corp. v. Jensen,* No. CIV 82-139 (D. Ariz. Sept. 23, 1982) *(Gates Learjet I).* After this partial dismissal, the defendants answered the complaint and filed a six-count counter-

claim. The counterclaim alleges improper termination of the distributorship agreement, unjust enrichment, interference with contractual-relations, and defamation. It added three parties to the litigation: B. S. Stillwell, Jane Doe Stillwell, and Stillwell Aviation Australia Party, Ltd. On May 31, 1983, the district court clarified its earlier dismissal order and dismissed counts two and three as to all of the defendants.

On October 5, 1983, after 18 months of trial preparation, the defendants challenged the convenience of the forum. The defendants allege that two civil actions pending in Philippine courts make the same allegations as the action brought by Gates in Arizona. On November 1, 1983, the district court conditionally dismissed counts one and four of the complaint under the doctrine of *forum non conveniens*. The court dismissed Gates' complaint on the following conditions: 1) The Philippine courts accept jurisdiction; 2) the defendants submit to that jurisdiction; 3) the defendants make their employees available for process and as witnesses; 4) the defendants waive any newly arisen statute of limitations defenses; 5) the defendants recognize any Philippine court judgment; and 6) all discovery and products may be used in any action in the Philippines, subject to objections which could be made in this court. *Gates Learjet Corp. v. Jensen*, No. CIV 82-139, slip op. at 11 (D. Ariz. Nov. 1, 1983) *(Gates Learjet II)*.

II. DISCUSSION

A. Personal Jurisdiction

The district court dismissed counts two and three of Gates' complaint for lack of personal jurisdiction. As the party seeking to invoke the jurisdiction of the court,

Gates has the burden of establishing personal jurisdiction. *Data Disc, Inc. v. Systems Technology Associates, Inc.*, 557 F.2d 1280, 1285 (9th Cir. 1977).[1] Arizona's long-arm statute establishes personal jurisdiction over over nonresidents to the maximum extent permitted by due process. *Houghton v. Piper Aircraft Corp.*, 112 Ariz. 365, 542 P.2d 24, 26 (1975). Due process requires the defendants to have certain minimum contacts with the forum so that maintenance of the suit does not offend traditional notions of fair play and substantial justice. *International Shoe Co. v. Washington*, 326 U.S. 310, 316 (1945); *Colonial Leasing Co. v. Pugh Brothers Garage*,

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[1] Gates contends that the defendants waived any objection to personal jurisdiction when they invoked the jurisdiction of this court by asking for affirmative relief in a permissive counterclaim. The courts are divided on the issue of whether the assertion of a permissive counterclaim should constitute a waiver of a jurisdictional defense. *Compare North Branch Products, Inc. v. Fisher*, 284 F.2d 611, 615 (D.C. Cir. 1960) (waiver) and *Merz v. Hemmerle*, 90 F.R.D. 566, 569 (E.D.N.Y. 1981) (waiver) *with Neifeld v. Steinberg*, 438 F.2d 423, 427 (3d Cir. 1971) (no waiver) *and Lomanco, Inc. v. Missouri Pacific Railroad Co.*, 566 F.Supp. 846, 851 (E.D. Ark. 1983) (no waiver). *See generally Annot.*, 17 A.L.R. Fed. 390 (1973). Although this court has held that the defendant's assertion of a compulsory counterclaim "does not constitute a waiver of any jurisdictional defense he previously or concurrently asserts," *Dragor Shipping Corp. v. Union Tank Car Co.*, 378 F.2d 241, 244 (9th Cir. 1967), we have not decided whether the assertion of a permissive counterclaim constitutes a waiver.

As to defendant Jensen, Inc., this case is easily resolved because Jensen, Inc. brought a motion to dismiss for lack of personal jurisdiction prior to the filing of the answer and counterclaim. *See Neifeld v. Steinberg*, 438 F.2d at 428 n.10 (clearly no waiver when jurisdictional defenses raised by motion prior to filing of answer).

735 F.2d 380, 383 (9th Cir. 1984). To satisfy this due process requirement, Gates may prove "general jurisdiction" or "limited jurisdiction."

1. GENERAL JURISDICTION

A sufficient relationship between the defendants and Arizona exists to support general jurisdiction if Gates can demonstrate that the defendants' activities within Arizona are "substantial" or "continuous and systematic." *See Data Disc, Inc. v. Systems Technology Associates, Inc.*, 557 F.2d at 1287. We review the district court's holding that Jensen "does not transact business within Arizona on a continuous or systematic basis, and does not provide the kind of contacts that would sustain exercise of general jurisdiction." *Gates Learjet I*, slip op. at 7.

The other defendants, however, did not raise the jurisdictional defense until they filed their answer and counterclaim. Nevertheless, we hold that the filing of a permissive counterclaim does not constitute a waiver of a personal jurisdiction defense asserted in the same pleading. Rule 12(b) of the Federal Rules of Civil Procedure implicitly authorizes a defendant to join a jurisdictional defense with a counterclaim without waiving this defense. The rule permits a defendant to raise jurisdictional defenses by motion or by answer. If we were to find a waiver when a defendants files a permissive counterclaim in the same pleading in which he asserts jurisdictional defenses, the purposes behind Rule 12(b) — to avoid the delay caused by successive motions and pleadings and to reverse the prior practices of asserting jurisdictional defenses by "special appearances" — would be thwarted. *See Neifeld v. Steinberg*, 438 F.2d at 429. Moreover, courts have noted that when the rule makers wanted to attach "waiver" consequences in certain situations, they did so explicitly. *See Id.* at 428 & n.11; *Lomanco, Inc. v. Missouri Pacific Railroad Co.*, 566 F.Supp. at 850.

Gates cites five activities to prove that defendants' contacts with Arizona were "continuous and systematic" and "substantial": 1) Jensen solicited the distributorship agreement in Arizona; 2) the defendants visited Tucson a number of times; 3) the airplane purchase agreements between Gates and Jensen contained an Arizona choice of law and forum provision; 4) the defendants purchased spare parts from Gates in Tucson; and 5) the defendants sent many letters and telexes and made numerous telephone calls to Tucson.

We must decide whether these contacts constitute sufficient activity in Arizona to conclude that the defendants "may in fact be said already to be 'present' there." *Wells Fargo & Co. v. Wells Fargo Express Co.*, 556 F.2d 406, 413 (9th Cir. 1977). Moreover, we must focus upon the "economic reality" of the defendants' activities rather than a mechanical checklist. *See Thos. P. Gonzales Corp. v. Consejo Nacional*, 614 F.2d 1247, 1254 (9th Cir. 1980) (quoting *Foster v. Mooney Aircraft Corp.*, 68 Cal. App.3d 887, 137 Cal. Rptr. 694, 697 (1977)).

We conclude that the "economic reality" here is that defendants' activities in Arizona were not "continuous and systematic" or "substantial". Jensen's solicitation of the distributorship agreement in Arizona and the defendants' visits to Tucson do not constitute "conducting business" in Arizona. *See Rocke v. Canadian Automobile Sport Club*, 660 F.2d 395, 399 (9th Cir. 1981). Making telephone calls and sending telexes and letters to Tucson are not activities which support a finding of general jurisdiction. *See Thos. P. Gonzales Corp. v. Consejo Nacional*, 614 F.2d at 1254. Furthermore, the choice of forum provision in the airplane purchase agreement applies only to disputes arising out of those agreements.

Significantly, the defendants did not establish a regular place of business in Arizona. *See Rocke v. Canadian Automobile Sport Club,* 660 F.2d at 399. These contacts in their totality do not demonstrate sufficient activity in Arizona to support general jurisdiction. Defendants' activities in Arizona were more occasional than continuous, and more infrequent than systematic.

2. LIMITED JURISDICTION

If a defendant's activities are not so pervasive to subject them to general jurisdiction, this court makes the following evaluation in determining whether there is limited jurisdiction:

> (1) The nonresident defendant must do some act or consummate some transaction with the forum or perform some act by which he purposely avails himself of the privilege of conducting activities in the forum, thereby invoking the benefits and protections of its laws.
>
> (2) The claim must be one which arises out of or results from the defendant's forum-related activities.
>
> (3) Exercise of jurisdiction must be reasonable.

Data Disc, Inc. v. Systems Technology Associates, Inc., 557 F.2d 1280, 1287 (9th Cir. 1977).

Gates clearly satisfies the first prong of this test. Not only did Jensen solicit the distributorship agreement in Arizona, but also the agreement specifically provides that Arizona law governs it. The distributorship agreement, therefore, directly invokes the benefits and protections of Arizona laws. *See O'Hare International Bank v. Hampton,* 437 F.2d 1173, 1177 (7th Cir. 1971); *Alchemie*

International, Inc. v. Metal World, Inc., 523 F.Supp. 1039, 1054 (D.N.J. 1981). Given these circumstances, Jensen should have reasonably anticipated "being haled into court" in Arizona. *See World-Wide Volkswagen Corp. v. Woodson*, 444 U.S. 286, 297 (1980).

Prong two of the *Data Disc* inquiry requires that each claim "arises out of or results from" the defendants' forum related activity. 557 F.2d at 1287. The district court had the most trouble with this part of the test, stating:

> The claims of counts two and three, sounding in tort law, cannot be said to arise out of the distributorship agreement. These claims result from the conduct of defendant outside the state, and are too attenuated a contact to justify exercise of personal jurisdiction.

Gates Learjet I, slip op. at 10. After examining the record, we conclude that the district court erred in finding that the claims in counts two and three are "too attenuated a contact" to justify the exercise of personal jurisdiction.

Count two of Gates' complaint alleges that the defendants filed two civil actions and one criminal complaint in the Philippines which caused the seizure of one of Gates' Learjets and the arrest of one of its employees. Count two alleges further that these actions were meant to harass, intimidate and threaten Gates and constitute an abuse of process. At first blush, this count may appear to be unrelated to the distributorship agreement. An examination of the complaint that the defendants filed in the Philippines on December 1, 1981, however, dispels any doubt that this count "arises out of" the distributorship agreement.

The first cause of action in the Philippines complaint alleges that Gates' nonrenewal of the distributorship agreement with the defendants was "clearly contrary to law, morals, good customs, public policy and public order." The second cause of action alleges "moral" and reputation damages for Gates' bad faith in refusing to renew the distributorship agreement. The third cause of action alleges wanton and fraudulent behavior in refusing to negotiate the renewal of the distributorship agreement. Thus, count two of Gates' complaint arose out of the distributorship agreement because its termination induced defendants' alleged harassment and intimidation of Gates. Count two was not too attenuated from the distributorship agreement to support a finding of limited jurisdiction.

We similarly conclude that count three of Gates' complaint satisfies the second prong of the *Data Disc* test. Count three alleges that the defendants interfered with Gates' contractual relations with its customers in the Philippines. This count also arises out of the distributorship agreement because its factual basis concerns whether Jensen improperly used Gates' tradenames contrary to the terms of the distributorship agreement.[2]

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[2] Gates cites cases that interpret an Arizona attorney's fee statute and hold that tort claims arise ou of a contract if they could not exist "but for" the contract. *See, e.g., Sparks v. Republic National Life Insurance Co.*, 132 Ariz. 529, 544, 647 P.2d 1127, 1141 (1982), *cert. denied*, 459 U.S. 1070 (1982). Although these cases interpret the "arises out of" language in a manner that supports Gates' construction, Gates never demonstrates why this court, in applying a constitutional due process test, should adopt an Arizona court's interpretation of an irrelevant state statute.

The third and final prong of the *Data Disc* inquiry requires a court's exercise of jurisdiction to be reasonable. 557 F.2d at 1287. This court has identified seven factors as pertinent to the reasonableness inquiry:

> (A) the extent of the defendant's purposeful interjection into the forum state; (B) the burden of defending in the forum state; (C) the extent of the conflict with the sovereignty of the defendant's state; (D) the forum state's interest in adjudicating the dispute; (E) the most efficient judicial resolution of the controversy; (F) the importance of the forum to the plaintiff's interest in convenient and effective relief; and (G) the existence of an alternative forum.

Rocke v. Canadian Automobile Sport Club, 660 F.2d 395, 399 (9th Cir. 1981); *see Insurance Co. of North America v. Marina Salina Cruz*, 649 F.2d 1266, 1270 (9th Cir. 1981). "These factors are not mandatory tests, each of which plaintiff must pass in order for a court properly to assume jurisdiction. Instead, the factors illuminate the considerations of fairness and due process set forth in *International Shoe*, 326 U.S. at 310." *Hedrick v. Daiko Shoji Co., Ltd., Osaka*, 715 F.2d 1355, 1359 (9th Cir. 1983).

The application of these factors to this case convinces us that it would be reasonable to subject the defendants to the jurisdiction of the Arizona court. We consider each of the factors in turn.

Although not extensive enough to support general jurisdiction, the contacts of LPI, Jensen, and Tomacruz with Arizona are sufficient to demonstrate a purposeful interjection into the forum state. Jensen solicited an inter-

national distributorship agreement in Tucson, which contained a choice of law provision specifying Arizona. Both Jensen and Tomacruz made several visits to the Gates' facilities and even accepted delivery of airplanes in Tucson. Moreover, these airplane purchase agreements contained choice of law and forum provisions, both of which specified Arizona. Thus, the terms of important contracts between Gates and the defendants demonstrate that the defendants had notice that they might be brought into a court in Arizona.

The burden on the defendants of defending in Arizona, as opposed to the Philippines, is potentially significant. Litigating abroad imposes significant inconveniences upon the party appearing in a foreign country. *Olsen By Sheldon v. Mexico*, 729 F.2d 641, 650 (9th Cir. 1984). We nevertheless conclude that the burden on the defendants would not be substantial here, primarily because the defendants must litigate in Arizona anyway. The district court found personal jurisdiction as to counts one and four. The extra burden of defending counts two and three in Arizona, particularly in light of their connection to counts one and four, would be minimal.

The reasonableness of jurisdiction depends also in part upon the seriousness of the potential affront to the sovereignty of the defendants' state. A foreign nation presents a higher sovereignty barrier than that between two states within our union. *Insurance Co. of North America v. Marina Salina Cruz*, 649 F.2d at 1272. Two of the three defendants named in counts two and three are residents of the Philippines. The government of the Philippines clearly has an interest in resolving disputes that involve its citizens. Nevertheless, we note that this factor is not dispositive because, if given controlling

weight, it would always prevent suit against a foreign national in a United States Court.

We examine next Arizona's interest in adjudicating this dispute. Arizona has a strong interest in ensuring that its citizens are fully compensated for their injuries, in part to protect the state's economic resources from unnecessary expenditures. *See Olsen By Sheldon v. Mexico,* 729 F.2d at 651.

At the current stage of the litigation, Arizona would appear to be the more efficient forum to resolve this dispute. Gates alleges, and defendants do not dispute, that discovery is completed and "this matter could be tried in a matter of weeks." In addition, although parts of counts two and three may require the application of Philippine law, the proof of both counts may also involve the application of Arizona law. For example, Gates may attempt to prove the unreasonableness of defendants' alleged actions in count two, in part, by demonstrating that Gates properly terminated the distributorship agreement, which proof would require the application of Arizona law. The district court in Arizona is the more efficient forum to resolve such interpretations of Arizona law. *See Hedrick v. Daiko Shoji Co., Ltd., Osaka,* 715 F.2d at 1359; *Raffaele v. Compagnie General Maritime,* 707 F.2d 395, 399 (9th Cir. 1983); *Insurance Co. of North America v. Marina Salina Cruz,* 649 F.2d at 1273.[3]

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[3] The Philippines, of course, may be the more efficient forum to apply possible Philippine law questions. Nevertheless, we conclude that Arizona is the more efficient forum because the action is almost ready for trial in Arizona.

An Arizona court certainly provides Gates with the most convenient forum for seeking relief. Unlike the individual plaintiff in *Raffaele v. Compagnie Generale Maritime,* 707 F.2d at 399, both parties here involve corporate entities apparently with sufficient resources to defend in either country. We therefore give some, but not significant, weight to this factor.

The final factor we consider is the availability of an alternative forum. Gates alleges that it may not receive a fair trial in the Philippines because of the "well publicized violent upheavals" there. We note that the "appellants must carry the burden of proving the unavailability of an alternative forum." *Olsen By Sheldon v. Mexico,* 729 F.2d at 651. We cannot say that Gates has satisfied this burden. In light of the other factors, however, this factor is not dispositive.

After considering all the relevant factors, we conclude that, on balance, the exercise of limited personal jurisdiction over the defendants by a federal district court in Arizona is reasonable. The defendants' numerous visits to Tucson and Jensen's solicitation of the distributorship agreement there demonstrate a purposeful interjection into the state of Arizona. Moreover, defending counts two and three would not burden defendants significantly because they must litigate counts one and four in Arizona anyway. We place some, but not substantial, weight on the convenience to Gates of litigating this dispute in Arizona. Finally, Arizona has an interest in adjudicating this dispute and, at this stage of the litigation, it is the more efficient forum.

In weighing these factors, we are not convinced that adjudication of this dispute in Arizona will affront the

sovereignty of the Philippines. Although the availability of an alternative forum supports the defendants' position, the other factors weigh more strongly in Gates' favor. The district court in its order did not weigh these factors, nor did it examine whether the exercise of personal jurisdiction would be reasonable. Under the *Data Disc* three-prong inquiry, therefore, the district court erred in dismissing counts two and three for lack of personal jurisdiction.

B. Forum Non Conveniens

On November 1, 1983, the district court conditionally dismissed Gates' complaint under the doctrine of *forum non conveniens.* Because the district court had dismissed counts two and three for lack of personal jurisdiction one year earlier, this dismissal pertained only to counts one and four, which allege unauthorized use of Gates' tradenames and trademarks. The dismissal would require Gates to pursue relief in the Philippine courts.

Whether an action may be dismissed for *forum non conveniens* when jurisdiction is otherwise properly invoked is governed by the factors outlined in *Gulf Oil Corp. v. Gilbert,* 330 U.S. 501, 508-09 (1947). The Court divided these factors into "private interest" and "public interest" factors, each of which must be weighed by the district court. As this court has noted:

> The private interest factors include "the relative ease of access to sources of proof; availability of compulsory process for attendance of unwilling, and the cost of obtaining attendance of willing, witnesses; possibility of view of premises, if view would be appropriate to the action; and all other practical problems that make trial of a case easy, expeditious and inexpensive." . . . The public interest factors in-

> clude the administrative difficulties flowing from court congestion; the local interest in having localized controversies resolved at home; the interest in having the trial of a diversity case in a forum that is familiar with the law that must govern the action; the avoidance of unnecessary problems in conflicts of law, or in application of foreign law, and the unfairness of burdening citizens in an unrelated forum with jury duty.

Cheng v. Boeing Co., 708 F.2d 1406, 1409-10 (9th Cir. 1983) (citations omitted), *cert. denied*, 104 S.Ct. 549 (1983).

If a district court properly analyzes and considers all relevant factors and its balancing of these factors is reasonable, its *forum non conveniens* dismissal "may be reversed only when there has been a clear abuse of discretion." *Piper Aircraft Co. v. Reyno*, 454 U.S. 235, 257 (1981). A district court, therefore, abuses its discretion when it fails to balance the relevant factors. *La Seguridad v. Transytur Line*, 707 F.2d 1304, 1308 (11th Cir. 1983). "Emphasis on the district court's discretion . . . must not overshadow the central principle of the *Gilbert* doctrine that 'unless the balance is strongly in favor of the defendant, the plaintiff's choice of forum should rarely be disturbed.'" *Manu International, S.A. v. Avon Products, Inc.*, 641 F.2d 62, 65 (2d Cir. 1981) (quoting *Gulf Oil Co. v. Gilbert*, 330 U.S. at 508).

We conclude that the district court did not balance the important relevant factors. The balance of the public and private interest factors is not strongly in favor of the defendants. We therefore hold that the district court's dismissal of counts one and four for *forum non convenier* was an abuse of discretion.

1. PRIVATE INTEREST FACTORS

The district court failed to examine at least two important and relevant private interest factors.[4] First, the district court did not recognize or consider in its balancing that Gates is a United States citizen and a resident of Arizona. A United States citizen has no absolute right to sue in a United States court. *Mizokami Brothers of Arizona, Inc. v. Baychem Corp.*, 556 F.2d 975, 977 (9th Cir. 1977) (per curiam), *cert. denied*, 434 U.S. 1035 (1978). The Supreme Court, however, as observed "that a plaintiff's choice of forum is entitled to greater deference when the plaintiff has chosen the home forum." *Piper Aircraft Co. v. Reyno*, 454 U.S. at 255; *see Koster v. Lumbermens Mutual Co.*, 330 U.S. 518, 524 (1947); *Paper Operations Consultants International, Ltd. v. SS Hong Kong Amber*, 513 F.2d 667, 672 (9th Cir. 1975). Greater deference is due because "a real showing of convenience by a plaintiff who has sued in his home forum will normally outweigh the inconvenience the defendant may have shown." *Piper Aircraft Co. v. Reyno*, 454 U.S. at 255 n.23 (quoting *Koster v. Lumbermens Mutual Co.*, 330 U.S. at 524).

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[4] The district court correctly began its analysis with a determination of whether there exists an alternative forum. *See Piper Aircraft Co. v. Reyno*, 454 U.S. at 254 n.22; *Cheng v. Boeing Co.*, 708 F.2d at 1410; *Pain v. United Technologies Corp.*, 637 F.2d 775, 784 (D.C. Cir. 1980), *cert. denied*, 454 U.S. 1128 (1981). The court noted that a defendant's amenability to process in the other jurisdiction ordinarily satisfies this requirement. *See Gulf Oil Co. v. Gilbert*, 330 U.S. at 506-07. We do not overturn the district court's finding of an alternative forum. That an alternative forum exists, however, is not dispositive in the balancing required in a *forum non conveniens* analysis.

The second relevant private interest factor the district court failed to examine is that the parties were ready for trial when it dismissed the complaint for *forum non conveniens*. The discovery deadline had passed; all documents needed for trial had been exchanged and/or identified; and all necessary trial documents were located in Tucson, Arizona. The central purpose of any *forum non conveniens* inquiry is to ensure that the trial is convenient. *Piper Aircraft Co. v. Reyno*, 454 U.S. at 256; *La Seguridad v. Transytur Line*, 707 F.2d at 1307. That trial preparation had progressed nearly to the point of trial certainly was a relevant factor when the district court considered whether trial of the case in Arizona would have been more "easy, expeditious and inexpensive" than trial in the Philippines. *See Gulf Oil Corp. v. Gilbert*, 330 U.S. at 508. Although no single factor is dispositive, we conclude that the district court's failure to weigh these private interest factors was an abuse of discretion.

We also observe that the private interest factors mentioned by the district court do not strongly support the defendants' position on *forum non conveniens*. The district court noted that "the vast majority of the witnesses reside in the Philippines. . . ." *Gates Learjet II*, slip op. at 9. The defendants, however, admit that the district court was not absolutely correct. In fact, 23 of the 44 witnesses, whom the parties designated in response to interrogatories, reside in the Philippines, which is hardly a "vast majority."

Furthermore, the district court improperly focused on the number of witnesses in each location. Instead, the court should have examined the materiality and importance of the anticipated witnesses' testimony and then determined their accessibility and convenience to the

forum. *See La Seguridad v. Transytur Line*, 707 F.2d at 1308-09; *Thomson & McKinnon v. Minyard*, 291 F.Supp. 573, 576 (S.D.N.Y. 1968). We also note that a district court should keep in mind that "the increased speed and ease of travel and communication . . . makes, especially when a key issue is the location of witnesses, no forum 'as inconvenient [today] as it was in 1947,'" when the Supreme Court decided *Gilbert*. *Manu International, S.A. v. Avon Products, Inc.*, 641 F.2d 62, 65 (2d Cir. 1981). We are not convinced that the court here properly considered and weighed this private interest factor. We therefore cannot give much deference to the district court's consideration of it.[5]

2. PUBLIC INTEREST FACTORS

In its consideration of public interest factors, the district court concluded that the Philippines "has a substantial interest in the outcome of the litigation." It reasoned that "most of the operating facts occurred in the Philippines," and that "[t]he controversies will require the application of Arizona law and Philippine law." *Gates Learjet II*, slip op. at 10. Public interest factors properly considered include "the local interest in having localized controversies resolved at home," and "the interest in hav-

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[5] In its discussion of private interest factors, the district court also noted that "almost all of the acts alleged in the complaints and counterclaims occurred in the Philippines." This observation, however, seems to pertain to the Philippines' interest in the action, which is a public interest factor. If the district court was instead referring to the convenience of obtaining certain evidence, it failed to explain what evidence was unavailable. As discussed above, most trial materials were located in Arizona at the time the district court dismissed counts one and four for *forum non conveniens*.

ing the trial of a diversity case in a forum that is familiar with the law that must govern the action." *Cheng v. Boeing Co.*, 708 F.2d at 1410.

We nevertheless conclude that the district court's consideration of these public interest factors rested on a mistaken assumption about the applicable law and improperly ignored the advantages of an Arizona forum for the trial. In noting that both Philippine and Arizona law applied to this matter, the district court apparently conconsidered all four counts of the Gates complaint. The defendants' motion to dismiss for *forum non conveniens*, however, could pertain only to counts one and four because the court had already dismissed counts two and three for lack of personal jurisdiction.

Counts one and four allege unauthorized use and a conspiracy to make unauthorized use of Gates' tradename and trademark. These counts involve an interpretation of the international distributorship agreement entered into between Gates and LPI. Under the heading, "Post-Termination Actions," the distributorship agreement provides:

> The Distributor shall immediately discontinue the use of any trade names or trademarks referred to in Article III above and shall make no further use of the same nor any other name, title, expression or mark so nearly resembling such trade names or trademarks as to be deceptive in nature.

The distributorship agreement also specifically provides that it shall be governed by Arizona law. Thus, counts one and four apparently are contract actions that require the application of Arizona law, not Philippine law.[6]

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[6] Defendants implicity admit this point, conceding that Arizona law would apply to a contract action.

In addition to making a mistaken assumption about the applicable law, the district court failed to weigh Arizona's interests in having the controversy "resolved at home." Arizona has a significant interest in interpreting its own laws. *See Cheng v. Boeing Co.*, 708 F.2d at 1411. Arizona also has an interest in protecting its companies from trademark infringement abroad to preserve the state's economic vitality. Although the situs of the alleged trademark and tradename infringement was the Philippines, it appears that Philippine law is not applicable. We therefore conclude that these public interest factors should not weigh heavily in defendants' favor. A proper understanding of the applicable law and the relative interests, in fact, suggests that Arizona has the more substantial interest in this litigation.

The district court particularly emphasized one public interest factor: the docket congestion of its court. It stated:

> Counsel have indicated that there are hundreds, if not thousands, of exhibits involved. There will be many witnesses testifying for both sides. The case will take weeks to try. The Tucson division of the District of Arizona is presently operating with two district judges. Normally there are three judges in the division. The two judges are handling all of the criminal calendar. Outside judges have been assigned to handle part of the civil calendar and it is contemplated that more help will be necessary in the future.

Gates Learjet II, slip op. at 10.

This factor also should not weigh heavily in defendants' favor. The real issue is not whether a dismissal will reduce a court's congestion but whether a trial may be

speedier in another court because of its less crowded docket. *See Starnes v. McGuire*, 512 F.2d 918, 932 (D.C. Cir. 1974) (en banc); 15 C. Wright, A. Miller & E. Cooper, *Federal Practice & Procedure* § 3854 at 289-91 (1976); *see also Foster v. Litton Industries, Inc.*, 431 F.Supp. 86, 88 (S.D.N.Y. 1977 (relative docket conditions accorded some, but not decisive, weight in transfer motions). The district court here observed only that its dockets was congested; it did not determine whether a trial would be speedier in the Philippines. Even if it were, however, it is unfair for a court to subject a United States corporation to the courts of another country merely because plaintiff's home country courts are congested. The *forum non conveniens* doctrine should not be used as a solution to court congestion; other remedies, such as placing reasonable limitations on the amount of time each side may have to present evidence, are more appropriate.

We hold that the district court failed to consider relevant private and public interest factors and misconstrued others. The district court therefore abused its discretion. On balance, we conclude that the relevant private and public interest factors support the district court's retention of jurisdiction and the dismissal of defendants' *forum non conveniens* motion.

III. CONCLUSION

Gates cannot demonstrate that the defendants had sufficient activity in Arizona to establish general jurisdiction. Under the *Data Disc* three-prong inquiry into limited jurisdiction, however, we hold that the district court erred in dismissing counts two and three for lack of personal jurisdiction. As to the district court's dismissal

of counts one and four for *forum non conveniens*, we find an abuse of discretion. The district court's orders are therefore

REVERSED AND THE CASE IS REMANDED.

APPENDIX B

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF ARIZONA

GATES LEARJET CORPORATION and GATES LEARJET EXPORT CORPORATION, *Plaintiffs,*	)	
vs.	)	**NO. CIV 82-139-TUC-ACM**
JAMES B. JENSEN, JR.,; RICARDO S. TOMACRUZ; LEARJET PHILIPPINES, INC., a corporation; JAMES B. JENSEN & CO., INC., a corporation, and HAMIX INTERNATIONAL LTD., a corporation, *Defendants.*	)	**RESPONSE TO DEFENDANT JAMES B. JENSEN & CO., INC'S MOTION TO DISMISS**

Plaintiffs, pursuant to Rule 12 of the Federal Rules of Civil Procedure, hereby respond to defendant James B. Jensen & Co., Inc.'s Motion to Dismiss. This Response is based on the attached Memorandum of Points and Authorities.

MEMORANDUM OF POINTS AND AUTHORITIES

Defendant James B. Jensen & Co., Inc. (hereinafter "Jensen, Inc.") objects to an Arizona Court's exercise of jurisdiction over it. In doing so, Jensen, Inc. is indulging in a corporate shell game in an attempt to confuse the Court and avoid proper exercise of its jurisdiction.

An examination of James B. Jensen's Answers to Interrogation, his Affidavit, and the Affidavit of Larry McDonough, attached hereto as Exhibit L, show that Mr. Jensen made numerous trips to Tucson, Arizona for various reasons, including the negotiation of the contract which established the relationship between the parties to this lawsuit. Mr. Jensen claims that all these visits were on behalf of Learjet Philippines, Inc., rather than Jensen, Inc. It can be safely assumed that if service had been obtained upon Learjet Philippines, Inc., he would be claiming that all the visits were on behalf of Jensen, Inc., a claim which would be supported by the evidence. The spuriousness of Mr. Jensen's claim that the early visits were on behalf of an entity other than Jensen, Inc. is made obvious by the recognition that Learjet Philippines did not even exist at the time of the early visits. Furthermore, all correspondence between the Parties was to and from James B. Jensen, as President of Jensen, Inc. *See* correspondence attached hereto as Exhibits A through F. Many of these letters refer to trips made by Jensen to Tucson and regard discussions which occurred at that time.

Finally, Jensen maintains that Learjet Philippines, Inc. and Jensen, Inc. are separate and distinct companies and that the latter had no contact with Tucson. However, an examination of correspondence from Learjet Philippines, Inc., shows that James B. Jensen, Inc. is the mailing address of Learjet Philippines, Inc. *See* Exhibit H attached hereto. Mr. Jensen, as President of Learjet Philippines, Inc., refers to James B. Jensen & Co., Inc. as "our San Francisco office" and "our U.S. Affiliate company". *See* Exhibit I attached hereto. A later letter from Mr. Jensen, as President of Learjet Philippines, Inc.,

again refers to James B. Jensen & Co., Inc. as "our San Francisco office" and asks that Learjet Philippines' mail be sent there. *See* Exhibit J attached hereto. Finally, Mr. Jensen, as President of Learjet Philippines, Inc., refers to James B. Jensen & Co., Inc. as its "U.S. purchasing arm". *See* Exhibit K attached hereto.

Evidently, the filing of this lawsuit has made these two corporate entities suddenly separate and distinct, at least in the mind of Mr. Jensen. It is readily apparent, however, from examination of the attached documents that:

A. Mr. Jensen, on behalf of Jensen, Inc., transacted business in the State of Arizona; and

B. That Mr. Jensen used Jensen, Inc. and Learjet Philippines, Inc. interchangeably with total disregard of separate corporate identities.

Therefore, James B. Jensen, Jr., President of James B. Jensen & Co., Inc. has been in Arizona on numerous occasions negotiating contracts with plaintiffs, attending distributor's conferences put on by plaintiffs, accepting delivery of merchandise from the plaintiffs in performance of contracts, etc. *See* Affidavits of Lawrence McDonough and James B. Jensen, James B. Jensen's Answers to Interrogatories and correspondence attached hereto. The agreement which underlies the dispute out of which this action arose was substantially negotiated in Tucson by Mr. Jensen. *See* contract attached as Exhibit A to the Complaint. Indeed, Mr. Jensen, on behalf of Jensen, Inc., came to Tucson and initiated the relationship with plaintiffs. *See* letters attached hereto as Exhibits A through G. Such solicitation of a contract or

transaction establishes that a party "purposely availed itself of the privilege of conducting activities" within a state. *Hanson v. Denckla,* 376 U.S. 235, 253, 78 S. Ct. 1228, 1239, 2 L.Ed. 1283 (1958). *See also Empire Abrasive Equipment Corp. v. H. H. Watson, Inc.,* 567 F.2d 554, 559 (3rd Cir. 1977); *Bernard Brothers, Inc. v. Pride Manufacturing, Inc.,* 427 F.2d 297, 391 n.9 (3rd Cir. 1970).

It should also be noted that Article XI in the aforementioned Contract, which is entitled Applicable Law, states "It is expressly agreed and understood that this agreement is an *Arizona* agreement and that it shall be governed by the laws of the State of Arizona of the United States of America in all matters, including, but not limited to, validity, obligation, interpretation, construction, performance and termination." (emphasis added) It is well settled that such choice of law provisions in a contract militate in favor of jurisdiction by the chosen state. *See Southwest Offset, Inc. v. Hudco Publishing Company,* 622 F.2d 149, 152 (5th Cir. 1980) and *Product Promotions, Inc. v. Cousteau,* 495 F.2d 483, 498 N.27 (5th Cir. 1974). *See Also O'Hara International Bank v. Hampton,* 437 F.2d 1173, 1177 (7th Cir. 1971) which held:

> "The fact that the guarantee was to be construed according to Illinois law . . . clearly demonstrates that the defendants 'invoked the benefits and protection of the state.' "

Similarly, the Court in *Alchemie International, Inc. v. Metalworld, Inc.,* 523 F.Supp. 1039 (D.N.J. 1981) found such a choice of law provision to be strong evidence of the existence of jurisdiction. The Court there stated·

> "I judge Metalworld was on such notice here when it solicited a contract of this size, with an explicit New Jersey choice of law provision from a known resident of the state of New Jersey. If it then wished to ensure that it would not be exposed to litigation in New Jersey, the choice of forum provision could have been negotiated; absent such provision, Metalworld should reasonably have anticipated being hauled into court in the state." *Id.* at 1054 (D.N.J. 1981).

Jurisdiction was upheld in that case which involved a defendant with far less contact to the forum than defendant Jensen, Inc. has with Arizona.

CONCLUSION

It is clear from an examination of the record that jurisdiction over defendant Jensen, Inc. can properly be exercised in the State of Arizona. Mr. Jensen, as President of Jensen, Inc. came to Arizona and negotiated contracts and engaged in other business activities. After Learjet Philippines was incorporated, Jensen, Inc. became a U.S. Affiliate and San Francisco office and continued with its contact with plaintiffs here in Tucson.

It should be pointed out that in a Motion to Dismiss for lack of jurisdiction, the Plaintiff needs only a prima facie showing of jurisdiction through its affidavits and supporting material. Such a prima facie showing suffices, notwithstanding any controverting presentation by the moving party, to defeat the motion. *Visual Sciences, Inc. v. Integrated Communications, Inc.*, 600 F.2d 56 (Second Cir. 1981); *Data Disc, Inc. v. Systems Technology Associates*, 557 F.2d 1280, 1285 (9th Cir. 1977); *United States v. Montreal Trust Company*, 358 F.2d 239, 245 (Second Cir. 1966). This has clearly been done. Ac-

cordingly, it is respectfully requested defendant's Motion to Dismiss For Lack of Jurisdiction be denied.

RESPECTFULLY SUBMITTED this 30th day of July, 1982.

BILBY, SHOENHAIR, WARNOCK & DOLPH, P.C.

By WILLIAM H. TINNEY
P. O. Box 871
Tucson, Arizona 85702
Attorneys for Plaintiffs

Copy of the foregoing mailed this
2nd day of August, 1982, to:
Gary F. Howard, Esq.

MOLLOY, JONES, DONAHUE, TRACHTA,
CHILDERS & MALLAMO, P.C.
2200 Arizona Bank Plaza
33 North Stone Avenue
Post Office Box 2268
Tucson, Arizona 85702
Attorneys for Defendants

EXHIBIT A

TELEX RCA
SAN FRANCISCO 278-259
MANILA 722-2097

TELEPHONE
(415) 956-2055

JAMES B. JENSEN & CO., INC.
IMPORTERS EXPORTERS
735 MONTGOMERY STREET, SUITE 1626
SAN FRANCISCO, CALIFORNIA 94104

March 1, 1978

Gates Learjet Export Corporation
P. O. Box 11186
Tucson, Arizona 85734

Attention: Mr. Finn Hedlund
Vice President Marketing

Dear Mr. Hedlund:

It was a pleasure meeting you early this week, and I wish to thank you for having given me the opportunity to express my desire to actively sell Gates Learjets in the Philippines.

As I mentioned, we have been active in business between the United States and the Philippines for the past 33 years, where we have specialized in supplying industrial and plant equipment and spare parts involving the sugar, cement, logging, light & power, and fertilizer industries, as well as various other industries.

Because of my personal interest in aviation, we began an active participation in this industry approximately four years ago, and within this time, we have developed a capability for selling aircraft and aircraft spares in the Philippine market. A particularly good relati hip I

have had within this period has been with Mr. Landis Carr and AiResearch Aviation, with whose cooperative effort we have sold three Merlins, one F-27F Executive, and one Turbo Commander aircraft. We have also sold various other aircraft, including a new Cessna Golden Eagle, and now, one of your Gates Learjet products.

We have a Philippine associate company, Aviation Specialist, Inc., which I personally own, which is completely staffed and operates locallling in the Philippines, dealing exclusively in aircraft sales and aircraft parts.

We have been successful in developing aircraft spares sales also, as a result of presently being the only operation in the Philippines with offices at the airport hangar area, as well as having offices in San Francisco with personnel knowledgeable about spares sources, thereby permitting us to service AOG requirements better and faster than anyone else in the Philippines.

We will have access to Learjet 36A, Serial No. 36, as well as the crew and mechanics of that aircraft who are considered as the cream of the crop in the General Aviation field in the Philippines. I also have on my staff as consultant, Capt. Ricardo Tomacruz, formerly a Vice President and Chief Pilot of the companies of General Hans Menzi. He has recently left those companies and is presently associated with me. Your Mr. James Bir knows Capt. Tomacruz and is familiar with his qualifications and competence with the Gates Learjet aircraft.

We are certain we can maximize sales of your aircraft in the Philippines, as we have strong personal contacts with the pilots' groups as well as the heads of industry and government, who are the potential buyers of the aircraft.

Our present forecast is a sale of four Gates Learjet aircraft in a 24-month period. Furthermore, I have formulated plans related to the sale to the Philippine government, and the success of this program would have highly productive results. This potential sale is in addition to the four units I have forecast for sale to business and industry.

We are most anixous to get underway with a sales program, needing only word from you that we can actively sell your products in the Philippine market.

We thank you for your past cooperation, and we look forward to future dealings with your company.

Yours very truly,
JAMES B. JENSEN & CO., INC.

By JAMES JENSEN, JR.
President

JJJR/lja

EXHIBIT B

Gates Learjet Export Corporation
p.o. box 11186 tucson, arizona 85734 (602) 294-4422 telex 666408

6 March 1978

Ref.: L-820-03-78-376
Mr. James B. Jensen, Jr.
President
James B. Jensen & Co., Inc.
235 Montgomery Street, Suite 1626
San Francisco, California 94104

Dear Mr. Jensen:

I want to take this opportunity to thank you for the valuable help you gave us recently on the sale of Learjet 36A-36.

It was a pleasure for all of us to have you here in Tucson last week, and to discuss with you how possibly our future business may be conducted in the Philippines.

I have read, with interest, your description of your businesses in the Philippines and California, and your experience and involvement in various areas of the aviation industry. Your access to 36A-36, as well as to its pilots and mechanics, constitutes an important ingredient of a future Learjet distributorship.

I agree with you that if we go after new business in a more constructive manner, and challenge Beechcraft domination in the Philippines, we can accomplish much more than has been accomplished in the past.

A decision relating to the appointment of a distributor in the Philippines will be made shortly. I promise to be in touch with you.

Sincerely,

FINN HEDLUND

FIH/dc
cc: J. E. Bir
S. W. Blankenship
R. E. Cloughley
J. M. Traisnel

EXHIBIT C

TELEX RCA
SAN FRANCISCO 278-259
MANILA 722-2097

TELEPHONE
(415) 956-2088

JAMES B. JENSEN & CO., INC.
IMPORTERS EXPORTERS
735 MONTGOMERY STREET, SUITE 1626
SAN FRANCISCO, CALIFORNIA 94104

March 20, 1978

Gates Learjet Export Corporation
P.O. Box 11186
Tucson, Arizona 85734

Attention: Mr. Finn Hedlund
Vice President Marketing

Dear Mr. Hedlund:

Regarding your request for a Philippine reference who could attest to our integrity and capability, I will request Mr. Roberto T. Villanueva, Chairman of the largest Philippine construction company, A.G.&P., Atlantic Gulf & Pacific Co. to send you a communication. He is also the chairman of PDCP, Private Development Corporation of the Philippines, a large development bank as well as of BISCOM, Binalbagan-Isabela Sugar Co., the largest sugar mill in the Far East.

We have known and been associated with Mr. Villanueva for more than thirty years.

Mr. Villanueva is a fine gentlemen of international stature who in his travels has no problems securing appointments to meet with such people as David Rockefeller at Chase Manhattan, Agnelli of Fiat, etc. In the

Philippines, he is well respected as an industrialist, banker, and economist.

For your information, I sold his sugar mill BISCOM a new Cessna 421-B Golden Eagle in 1976. This aircraft is shared by his group of companies and with their expanding construction contracts in Saudi Arabia and the recent forming of their new company A.G.&P. Saudi, I have them as a candidate for a Learjet in 1979. Furthermore their chief pilot was hired through my recommendation and enhances my position by having loyal support from the owners as well as the pilot.

I contacted Mr. Villanueva's office today and understand that he is on a short trip but expected to return sometime next week. He will send you a communication as soon as he returns.

I am enclosing a brochure of A.G.&P. as well as a recent annual report.

I can secure other references if necessary, such as Mr. Emilio Abello, Chairman of Manila Electric Company, the largest Philippine corporation in equity. He is also Chairman of P.C.I.B., Philippine Commercial and Industrial Bank, a very large Philippine private commercial bank. Your firm may also contact him directly.

I have prepared my list of prospective Learjet clients and will provide you complete details when appropriate including when sales to them can be contemplated. I will furnish you details on their activities and provide you their annual report if available. In almost all cases I have personal contacts with their principal officers as well as their pilots.

We are ready for an all-out effort to sell and promote Learjets in the Philippines and need only word from your company to proceed with my plans. Learjet 36-A S/N 36 will be arriving in Manila this Thursday and will be of great help in my promotions.

We thank you for your past cooperation and we look forward to future business with your company.

Yours very truly,
JAMES B. JENSEN & CO., INC.

JAMES JENSEN, JR.
President

JJJR:lja
Encl. as stated

EXHIBIT D

TELEX RCA
SAN FRANCISCO 278-259
MANILA 722-2097

TELEPHONE
(415) 956-2055

JAMES B. JENSEN & CO., INC.
IMPORTERS EXPORTERS
735 MONTGOMERY STREET, SUITE 1626
SAN FRANCISCO, CALIFORNIA 94104

May 4, 1978

Mr. Finn Hedlund
Gates Learjet Export Corporation
P.O. Box 11186
Tucson, Arizona 85734

Dear Mr. Hedlund:

Enclosed please find International Distributor Agreement duly signed, prospect review as well as other data which you might find of interest.

A spec sheet with prices was given to me by the chief pilot and head of the aviation department of Ayala Corporation. This relates to the Citation II which Heli-Orient has earmarked for their purchase. I have attempted to halt this transaction and have them consider a Learjet and I have the cooperation of the chief pilot as well as the corporate finance man but they also tell me that they are uncertain as to how deeply their president has made a verbal commitment. Apparently no effort had been made by the former Learjet distributor and I am a bit late but doing my utmost to salvage the situation. This would normally have a fairly easy sale as the president of Ayala Corporation, Mr. Enrique Zobel de Ayala is a proficient pilot.

Re Marinduque Mining, you will find enclosed a newspaper clipping showing their poor corporate performance for the past two years. Although we know the chief pilot, we have not been able to contact him as he is out of the country. An executive secretary has told us confidentially that management people have been avoiding meeting with the Cessna people although she mentions that some deposit has been made. We will revert to this shortly but it seems that this company will be out of the picture related to purchasing an aircraft for a while.

We are actively promoting the sale of Learjets and we expect to be able to show some accomplishments in the very near future.

Sincerely,
JIM JENSEN

JJJR/lja
Encl.

EXHIBIT E

TELEX RCA
SAN FRANCISCO 278-259
MANILA 722-2097

TELEPHONE
(415) 956-2055

JAMES B. JENSEN & CO., INC.
IMPORTERS EXPORTERS
735 MONTGOMERY STREET, SUITE 1626
SAN FRANCISCO, CALIFORNIA 94104

May 19, 1978

Mr. Finn Hedlund
Gates Learjet Export Corporation
P.O. Box 11186
Tucson, Arizona 85734

Dear Mr. Hedlund:

You will find enclosed a copy of list of corporations as well as chief executives or aviation department heads who we feel should be sent a copy of Contrails. We have sent a copy of this list to Mr. Dave Wodraska.

Also enclosed is a copy of letter sent me by Ricardo Tomacruz regarding follow up on prospective Learjet customers. We will continue to explore how to discourage Col. Zobel from continuing with taking delivery on the Citation II and hope that there might be a long delay in meeting deliveries which would enable him to back out from his commitment. To my knowledge, no money has yet changed hands.

We will continue to provide you with up to date information and we hope that we will have news of a better nature in the very near future.

Sincerely,
JAMES JENSEN, JR.

JJJR/lja

P.S. I am returning the blue copy of the International Distributor Agreement with my initials affixed per your request. Many thanks.

EXHIBIT F

TELEX RCA
SAN FRANCISCO 278-259
MANILA 722-2097

TELEPHONE
(415) 956-2055

JAMES B. JENSEN & CO., INC.
IMPORTERS EXPORTERS
735 MONTGOMERY STREET, SUITE 1626
SAN FRANCISCO, CALIFORNIA 94104

May 22, 1978

Mr. Finn Hedlund
Gates Learjet Export Corporation
P.O. Box 11186
Tucson, Arizona 85734

Dear Mr. Hedlund:

You will find enclosed our confidential list of prospective Learjet clients in the Philippines. Some on this list are prospects with a potential for making an immediate purchase whereas others are potential buyers within two or three years. In other words, this list covers prospective purchasers for the coming three to five years; there should be very few companies or individuals coming up in the near future who could be added to this list.

Our marketing program is geared to interesting these companies or individuals into purchasing a Learjet as management tools or for whatever purpose it might suit them.

As the interest in their possibly purchasing a Learjet increases, we will keep you informed so that we can maximize our efforts towards an eventual sale.

We trust that this list will provide you with an accurate evaluation of the potential of the Philippine market. Bear in mind, however, that the continued growth of the local economy is essential towards the success of marketing the Learjets in the Philippines and we do hope that we will be blessed with those necessary ingredients.

We thank you for your past cooperation and your faith in us, and we look forward to many years of fruitful cooperation.

Sincerely,
JAMES JENSEN, JR.

JJJR/lja

EXHIBIT G

TELEX RCA
SAN FRANCISCO 278-259
MANILA 722-2097

TELEPHONE
(415) 956-2055

JAMES B. JENSEN & CO., INC.
IMPORTERS EXPORTERS
735 MONTGOMERY STREET, SUITE 1626
SAN FRANCISCO, CALIFORNIA 94104

May 25, 1978

Mr. Stanley W. Blankenship
Gates Learjet Corporation
Mid-Continent Airport
P. O. Box 1280
Wichita, Kansas 67201

Dear Stanley:

Enclosed you will find copies of the pictures I took of your Learjet stand during your recent visit to Manila.

I am also enclosing a copy of a recent letter I sent Mr. Finn Hedlund regarding the status of the Philippine market as well as a list of prospective clients with whom we have or will be exerting sales efforts.

We enjoyed working together with you and I personally value the fact that I found a friend in the Learjet family.

Sincerely,
JAMES JENSEN, JR.

EXHIBIT H

LEARJET / PHILIPPINES, INC.
prescon strata 100 bldg., suite 10h, emerald ave., pasig,
metro manila, Philippines
tel. 693-4259 or 693-4260 • telex (RCA) 722-2097

16 December 1980

MR. PHIL LOVETT
Senior Vice-Pres., Marketing
Gates Learjet Export Corporation
P. O. Box 11186
Tucson, Arizona 85734

Dear Mr. Lovett:

We are in receipt of your letter of December 1, 1980, and noted your request extending the 1980 International Distributors Agreement with GLEC from its current expiration date until April 30, 1980.

Mr. James Jensen, Jr., is presently on a South East Asian tour and will be proceeding from Hong Kong to San Francisco for the christmas holidays to visit his mother. Upon his return we shall transmit our formal conformity with his signature, as stated in your letter.

May we reiterate our standing request to expedite mail to us that "All correspondence and brochures should be marked – HOLD FOR THE POUCH TO THE PHILIPPINES – and be sent to the following address:

LEARJET PHILIPPINES, INC.
c/o James B. Jensen & Co., Inc.
235 Montgomery St., Suite 1626
San Francisco, California 94104

Very truly yours,
LEARJET PHILIPPINES, INC.
RICARDO S. TOMACRUZ
Vice Pres. & Gen. Manager

RST/ngm

NCC hangar, manila domestic airport, manila, philippines
tel. 828-31-32

EXHIBIT I

LEARJET / PHILIPPINES, INC.
prescon strata 100 bldg., suite 10h, emerald ave., pasig,
metro manila, Philippines
tel. 693-4259 or 693-4260 • telex (RCA) 722-2097

12 October 1978

Mr. D. B. Norton, Vice President, Product Support
Gates Learjet Corporation
P. O. Box 7707
Wichita, Kansas 67277

Dear Mr. Norton:

I have been informed by our San Francisco office of JAMES B. JENSEN & CO., INC., that your office has not yet established a discount policy for our firm.

I wish to request that your firm grant Learjet Philippines, Inc. and our U.S. affiliate company James B. Jensen & Co., Inc. the customary discounts you normally extend to your international distributors.

You will find enclosed xerox copy of GLEC infogram Ref.: BA-78-78 dated 23 August 1978 referring to GLEC list of distributors as well as copy of page 6 of that Infogram referring to our being the distributor for the Philippines.

You will also find enclosed xerox copy of a request for bids from James B. Jensen & Co., Inc., ref. ASI-137-9 requesting for a price and delivery on a fuel control computer.

Please advse if we would be entitled to a discount on

the purchase of this item; also please advise your general discount schedule on proprietary and non-proprietary items.

Thank you for your attention to this request.

Yours very truly,
LEARJET PHILIPPINES, INC.
JAMES JENSEN, JR.
President

JJJR/ngm
encl.

NCC hangar, manila domestic airport, manila, philippines
tel. 83-31-32

EXHIBIT J

LEARJET / PHILIPPINES, INC.
prescon strata 100 bldg., suite 10h, emerald ave., pasig,
metro manila, Philippines
tel. 693-4259 or 693-4260 • telex (RCA) 722-2097

11 February 1981

Mr. Lawrence McDonough
Gates Learjet Export Corporation
P. O. Box 11186
Tucson, Arizona 85734

Dear Larry:

> We confirm our telex of February 4, 1981 as follows: "Your letter November 25, 1980 only received now. We assure you we would not involve ourselves in the Hedlund controversy or possible court case between Gates Learjet and Hedlund. As your distributor we value not only the good relationship we have built but also our dedicated loyalty to the company. Our letter to Lovett a mere statement of some grievance, definitely not directed against Gates Learjet. Past performance will attest we have always exerted utmost efforts as distributor. We are committed to act only for the best interest of Gates Learjet. Letter follows."

Permit us to elaborate on the transaction of the 35A-338 which is the crux of our letter to Mr. Lovett.

Our 35A-338 slot was made possible thru the kind assistance of Mr. Hedlund when he visited us in Manila last August 1979 while still connected with GLEC. We do not deny that in our dealings with Mr. Hedlund he has

become not only a business associate due to his position at GLEC but also a personal friend. A copy of our letter to Mr. Lovett was given him against this background and there was never the intention of the same being used as a basis for any action against Gates Learjet.

NCC hangar, manila domestic airport, manila, philippines
tel. 83-31-32

LEARJET / PHILIPPINES, INC.
prescon strata 100 bldg., suite 10h, emerald ave., pasig,
metro manila, Philippines
tel. 693-4259 or 693-4260 • telex (RCA) 722-2097

Mr. Lawrence McDonough
Gates Learjet Export Corp.
Page 2 . . . .

Except for the unpleasant incident concerning the 338 delivery which we have considered as an isolated case, we as distributor, have nothing but high praise and regard in our dealings with Gates Learjet. This attitude has never been altered. As your distributor, we pledge to Gates Learjet our loyalty, and will continue to do so, in order to promote our mutual interests, well-aware that our previous efforts have been accorded due recognition, having been cited for outstanding achievement in the last Distributor's conference in September 1980.

We regret the 338 incident which continues to plague us. Our client who purchased the aircraft has complained to us in strong terms that they have to date not been able to place the aircraft in service due to registration problems still unresolved to their satisfaction. We hope to settle this issue, as the owner is our most valued client.

We are hopeful that with this communication, all matters shall have been duly clarified.

May we kindly reiterate our-previous request that mail for Learjet Philippines be sent to our San Francisco office, to wit:

LEARJET PHILIPPINES, INC.
c/o James B. Jensen & Co., Inc.
Hearst Building Suite 422
Corner Market St. & Third St.
San Francisco, California 94103

HOLD FOR POUCH TO MANILA, PHILIPPINES

Very truly yours,

LEARJET PHILIPPINES, INC.
JAMES JENSEN, JR.
President

JJJR/ngm
cc: Mr. Phil Lovett

NCC hangar, manila domestic airport, manila, philippines
tel. 83-31-32

EXHIBIT K

LEARJET / PHILIPPINES, INC.
prescon strata 100 bldg., suite 10h, emerald ave., pasig,
metro manila, Philippines
tel. 693-4259 or 693-4260 • telex (RCA) 722-2097

September 28, 1981

Mr. John Benson
Vice-President, International Marketing
Gates Learjet Export Corporation
P. O. Box 11186
Tucson, Arizona 85734

Dear Mr. Benson:

Thank you for your kind courtesies extended me in my trip to Tucson last September 21, 1981.

With regard to our discussion with you and Mr. Fahey relative to the Philippine territory, as well as the written check list given to me, enumerating distributor qualification requirements, we wish to assert added data in line with your requirements and for which we feel qualify us. We furthermore assert our desire to *continuously upgrade our organization as well as our facilities,* not only to render a *more than adequate support* for the present fleet, but also to prepare us for dynamic activity into the next decade.

As to our marketing activities, we make continuous efforts through *personal contacts* and brochures to keep both corporate heads as well as present pilots of turboprop aircraft informed of the capabilities and cost effectiveness of Learjet aircraft. On the pilot level, we involve

ourselves in the training flights of present Learjets, such as operations into a short, high altitude airport for purposes of constant development of pilot proficiency. On such training flights, we often times invite particular turboprop pilots to be on board as a means of creating insider support from among the professional pilot group. Our Mr. Tomacruz constantly arranges for these types of activities which contribute to pilot proficiency for present Learjet pilots and knowledge of product to the turboprop pilots who will perhaps be the next group of corporate Learjet pilots.

Besides our corporate offices at the Strata 100 Building in the Ortigas Commercial Center, we have facilities at NCC hangar at the Manila Domestic Airport area where we also base our *two full-time mechanics,* one of whom has a substantial experience in Learjet aircraft and possesses both a Philippine CAA license as well as an American FAA license as per enclosed bio-data.

In the field of spares support, Learjet Philippines as well as its U. S. purchasing arm, James B. Jensen & Co., Inc., purchased directly from Gates Learjet Corporation spares in the amount of U. S. dollars $75,544.68 in 1980 and $131,141.61 to date in 1981, all for its account in support of the Philippine fleet.

We have submitted the mechanics of the Forward Order Program to our Philippine attorneys for comment as to compliance with the laws of the Republic of the Philippines as regards to foreign exchange, and we will revert as soon as they answer.

We welcome Mr. Michael Fahey to visit with us for constructive talks on his next trip to our part of the world,

and we look forward to a strengthening of ties to the benefit of our respective companies.

Yours very truly,

LEARJET PHILIPPINES, INC.
By JAMES JENSEN, JR.
President

JJJr/lja

cc: Mr. B. S. Stillwell, General Manager
Encl. as stated

NCC hangar, manila domestic airport, manila, philippines
tel. 83-31-32

EXHIBIT L

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF ARIZONA

GATES LEARJET CORPORATION and GATES LEARJET EXPORT CORPORATION *Plaintiffs,* vs. JAMES B. JENSEN, JR.; RICARDO TOMACRUZ; LEARJET PHILIPPINES, INC., a coporation; JAMES B. JENSEN & CO., INC., a corporation; HAMIX INTERNATIONAL LTD., a corporation *Defendants.*	**NO. CIV 82-139-TUC-ACM** **AFFIDAVIT IN SUPPORT OF PLAINTIFFS' RESPONSE TO DEFENDANTS' MOTION TO DISMISS**

LAWRENCE MCDONOUGH, of lawful age and being first duly sworn upon his oath, states:

I am the Secretary and General Counsel of Gates Learjet Corporation and I am thereby authorized to make this Affidavit on behalf of Gates Learjet Corporation.

I am personally familiar with JAMES B. JENSEN, JR. and I know of my own personal knowledge that MR. JENSEN has visited Gates Learjet's marketing facilities and manufacturing plant located on the Tucson International Airport in Tucson, Arizona, on many occasions for the purposes of transacting business with Gates Learjet Corporation within the state of Arizona.

In the spring months of 1978, MR. JAMES B. JENSEN, JR. conducted negotiations with various Gates Learjet personnel at the Gates Learjet marketing headquarters at 6868 South Plumer in Tucson, Arizona, in order to obtain Gates Learjet's appointment of MR. JENSEN and his Philippine corporation, LEARJET PHILIPPINES, INC., as Gates Learjet's distributor for the country of the Republic of the Philippines. Thereafter, MR. JAMES B. JENSEN, JR. attended and participated in Gates Learjet Corporation's annual distributor conferences held at the Westward Look Resort in Tucson, Arizona, in September of 1978, September of 1979, and September of 1980. During such conference meetings, MR. JENSEN took part in discussions involving Gates Learjet Corporation personnel and personnel from various other Gates Learjet Corporation's distributors worldwide about Gates Learjet's products, methods of business, and methods of distribution of its product. MR. JENSEN also attended and took part in various social functions surrounding those distributor conferences.

On various occasions during 1978, 1979 and 1980, MR. JAMES B. JENSEN, JR. visited various Gates Learjet Corporation personnel at Gates Learjet Corporation's marketing headquarters and the manufacturing plants located on the Tucson International Airport at Tucson, Arizona, for the purpose of negotiating the purchase of Learjet aircraft, for the purpose of accepting delivery of such aircraft, and for the purpose of negotiating terms and conditions under which he would continue to serve as a Gates Learjet Corporation international distributor.

FURTHER affiant saith not.

LAWRENCE MCDONOUGH

SUBSCRIBED AND SWORN to before me
this 16th day of April, 1982.

DIANE SLAUGHTER
Notary Public

My Commisson expires: July 12, 1985

APPENDIX C

Gary F. Howard
MOLLOY, JONES, DONAHUE, TRACHTA,
CHILDERS & MALLAMO, P.C.
2200 Arizona Bank Plaza
33 North Stone Avenue
Post Office Box 2268
Tucson, Arizona 85702-2268
Telephone: (602) 622-3531
Attorneys for Defendants/Counterclaimants

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF ARIZONA

GATES LEARJET CORPORATION and GATES LEARJET EXPORT CORPORATION, *Plaintiffs,*	)	**NO. CIV 82-139 TUC-ACM REPLY MEMORANDUM RE MOTION TO DISMISS**
vs.	)	
JAMES B. JENSEN. JR.; et al., *Defendants.*	)	
JAMES JENSEN, JR.; et al., *Counterclaimants,*	)	
vs.	)	
GATES LEARJET CORPORATION; et al., *Counterdefendants.*	)	

COME NOW Defendants/Counterclaimants, and for their Reply Memorandum regarding the Motion to Dismiss, submit the following:

MEMORANDUM OF POINTS AND AUTHORITIES

As was said in the original Motion to Dismiss, Counterclaimants cannot *force* Counterdefendants to agree to litigate the Philippine-related claims in the Philippines. The Court may, on its own motion, be able to do that. But for purposes of this Memorandum, we will only discuss the Plaintiffs' claims against the Defendants. When the Court looks at the location of the witnesses on those claims, the issue of what law will be applied and the basic question of where those claims can most fairly and expediently be litigated, it would be unfair to suggest that the trial take place anywhere *but* the Philippines.

Before getting to those issues, though, Defendants would like to address the question of the current political situation in the Philippines. The dismissal contemplated by Defendants (and based on this Court's citation of *Cheng v. Boeing*, the Court is thinking along these lines as well) is a *conditional* dismissal. If the system of civil law in the Philippines deteriorates to the point that a trial cannot be had, then this Court can once again take jurisdiction of the claims Defendants do not, by making the suggestion, waive their objections to the exercise of this Court's jurisdiction over their persons. Defendants only mean that since the dismissal would be conditional, if Plaintiffs are dissatisfied with the progress they are making toward getting the case to trial in the Philippines, they can ask this Court to set aside the dismissal. That does *not* mean that this Court will somehow acquire jurisdiction over the persons of the Defendants that it did not otherwise have. The exercise of jurisdiction over the Defendants will still be governed by the principles of *International Shoe Co. v. State of Washington*, 326 U.S. 310, 66 S.C. 154, 90 L. Ed. 95 (1945)

Plaintiffs stated in paragraphs I, II and III of their Opposition that Plaintiffs are residents of Arizona and their choice of forum is Tucson, Arizona; that Plaintiffs are doing business in Arizona, and that Arizona law applies.

Plaintiffs are foreign corporations authorized to do business in Arizona. However, Defendants/Counterclaimants contend that as part of the daily business activity of Plaintiffs, Plaintiffs by their own choosing enter into contratcual agreements with various countries throughout the world in order to promote and sell their product – Learjets. As part of that promotion, Plaintiffs enlist the assistance internationally by way of distributorship agreements. These contractual agreements are known as "International Distributor Agreements".

Attached hereto as Exhibit "A" is a copy of a letter dated December 10, 1979, to James Jensen, Jr., forwarding for review and execution of the 1980 International Distributor Agreement, which *was executed* in the Philippines by Mr. Jensen, forwarded to GLC/GLEC and copy returned by mail to Mr. Jensen, as shown in the attached letter dated March 25, 1980 (see attached Exhibit "B").

Defendants/Counterclaimants do not disagree that Arizona laws applies to at least one of the Plaintiffs' claims (the breach of contract). But Defendants suggest that Arizona law can be applied in the Philippines, just as easily, as Philippine law as to Plaintiffs' other claims (e.g. interference with contractual relations) can be applied here. The law does not support Plaintiffs' argument on "choice of law." In *Piper Aircraft Company v. Reyno*, 454 U.S. 235, 102 S. Ct. 252, 70 L. Ed. 2d 419

(1981), the Supreme Court found that even though Scottish law may apply and may even have been less favorable to plaintiff, the District Court did not err in dismissing the matter under the doctrine of *forum non conveniens*.

A trial in Tucson would not be convenient for Defendants. Defendants/Counterclaimants have communicated with their counsel primarily through a telex service and/or long distance phone calls. Numerous affidavits have been secured through the Embassy of the Philippines and filed with this Court. In addition, Defendants/Counterclaimants have secured counsel in the Philippines in order to depose Messrs. Franco, Polotan, Rivera and Marcelo, all at considerable expense.

Plaintiffs have inundated Defendants/Counterclaimants with discovery motions and various pleadings, and when it became difficult to obtain the information requested, Plaintiffs would file then another motion to compel and/or ask for sanctions, knowing that counsel for Defendants/Counterclaimants would have a difficult time in securing documentation, etc. While all documentation was readily accessible to GLC/GLEC, the problem for Defendants/Counterclaimants' counsel communicating in excess of some 6,000 miles became quite a task for Defendants/Counterclaimants counsel. Upon receipt of documentation, if any questions were to be asked, it would have to be done either by long distance call and/or telex service. Information, witnesses and verification through the Embassy was not easily accessible for Defendants/Counterclaimants' counsel.

Some of the private interests factors in determining whether or not a case should be dismissed on grounds

of *forum non conveniens* include relative ease of access to sources of proof, availability of compulsory process for attendance of unwilling and the costs of obtaining attendance of willing witnesses, *Cheng v. Boeing Co.*, 708 F.2d 1406, 1410 (9th Cir. 1983).

The greater bulk of witnesses and exhibits are not located in the United States. All alleged acts actually occurred in the Philippines, with the exception of Count V of Defendants/Counterclaimants' Counterclaim. In their opposition, Plaintiffs set forth a "Witness List"; however, Defendants/Counterclaimants ask that the Court look to the Plaintiffs claims against the Defendants and where all the witnesses on those claims are located. Plaintiffs have omitted a number of witnesses listed in their answers to non-uniform interrogatories, to-wit:

1. General Ferdinande Marcos, Presidential Palace, Philippines, who will testify as to the reputation and standing of LPI and its principals.

2. Mrs. Monlopaz, Manila, Philippines, will testify as custodian of records for LPI and related matters.

3. Ruben Roya, employee of LPI, will testify as to work he did, pay he received, expenses incurred and related matters.

4. Mr. Justimanio, employee of LPI will testify as to work he did, pay he received, expenses incurred and related matters.

5. Renairio Paras, employee of LPI, will testify as to work he did, pay he received, expenses incurred and related matters.

6. Rolando Alipio, employee of LPI, will testify as to work he did, pay he received, expenses incurred and related matters.

7. Benedicto Corpus, employee of LPI, will testify as to work he did, pay he received, expenses incurred and related matters.

8. General Menzi, Manila, Philippines, will testify as to the intereference of the sale of a Learjet (See attached Exhibits "C" through "H".)

All alleged acts of trademark enfringement and interference of contractual relations occurred in the Philippines, and most all witnesses that will testify to the alleged enfringement and interference are in the Philippines, and most all witnesses that will testify to Counterclaimants' interrogatories dated March 11, 1983, Plaintiffs stated in their response to Interrogatory No. 3, attached hereto as Exhibit "H", that Jensen, Tomacruz and LPI continued to use the tradename Learjet. Plaintiffs went on to further state "from their present information", which can only mean they had to depend on Philippine sources for this information, and not from any information received in the United States. If a conspiracy even existed, it existed in the Philippines and any alleged interference with Plaintiffs' contractual relationship is going to be tried under Philippine law.

As a further reason opposing dismissal, Plaintiffs attempt to try and use their own wrongdoing with the legal authorities in the Philippines to their advantage. If one travels to a foreign country and breaks that country's law, one must expect to bear the consequences of that country's jurisdiction. It is reasonable to assume

that, if Plaintiffs go into the Philippines or any other country and obey its laws, they will be treated as any other citizen of that country. Plaintiffs' raising of this issue is without merit in that that incident has nothing whatsoever to do with the issues before this Court and those claims were dismissed by this Court.

Plaintiffs refer to a waste of litigation resources. Plaintiffs' remarks are without justification. Since (a) all but one of the witnesses on Plaintiffs' Complaint are really located in the Philippines, (b) the alleged acts occurred in the Philippines, (c) Plaintiffs, as part of their daily business, chose to promote their product — Learjets — internationally, it is not unreasonable to have the trial of their claims take place in the Philippines.

Plaintiffs also allege that at the very least one of their attorneys would have to go to the Philippines for an extended period of time and, further, that all exhibits are contained in Tucson, Arizona, and Kansas. This hardly seems accurate since GLC/GLEC already have counsel in the Philippines who were present during the Franco, Rivera, Polotan and Marcelo depositions. All documentation provided by Defendants/Counterclaimants were derived from the files of Defendants/Counterclaimants located in the Philippines. *Even* as early as December 16, 1981 (two months *prior* to Plaintiffs filing this lawsuit), Plaintiffs were informed by Rolando Moscardon via telex that:

> ". . . I strongly recommend that lawyers with real clout be hired to work with, if not take over from Celso [GLC's then counsel in the Philippines]. While everyone feels you will eventually win both

> cases, delays that other side seems easily able to obtain from the court would cause you more damage."

Apparently even Moscardon, (who claims he was not appointed the Learjet distributor until October 1982, yet acted under an implied agreement,) felt Plaintiffs would win in the Philippines if lawyers with "real clout" were hired (see attached Exhibit "I").

Defendants/Counterclaimants have never agreed and do not now agree that this Court has jurisdiction over their person to hear Plaintiffs' claims against them. Therefore, if this Court were to grant this Motion to Dismiss on the grounds of *forum non conveniens,* the Plaintiffs would not really be losing that much. It is not at all clear that Plaintiffs will be able to convince the Court that the evidence at trial supports the exercise of jurisdiction over the person of even LPI, but there is certainly only the flimsiest evidence, if any, to support the exercise of jurisdiction over the persons of Messrs. Tomacruz and Jensen and Hamix International, Ltd. So, dismissal on the grounds of *forum non conveniens* may really be nothing more than bowing to the inevitable.

SUMMARY

The Plaintiffs' Complaint against Defendants should, by every test applicable, be tried in the Philippines. If it is Plaintiffs' wish that the Counterclaims all be tried in Arizona without the unnecessary delay and confusion caused by being intermingled with Plaintiffs' Complaints, then Plaintiffs may be entitled to have the Counterclaims tried here. That is more an issue between Plaintiffs and the Court. Counterclaimants really have no

right to insist that Counterdefendants submit themselves to the jurisdiction of the courts of the Philippines.

Respectfully submitted this 14th day of October, 1983.

MOLLOY, JONES, DONAHUE,
TRACHTA, CHILDERS &
MALLAMO, P.C.

By GARY F. HOWARD
Attorneys for
Defendants/Counterclaimants

COPY of the foregoing Reply Memorandum re
Motion to Dismiss mailed/delivered this
14th day of October, 1983, to:
William H. Tinney, Esq.
BILBY, SHOENHAIR, WARNOCK
& DOLPH, P.C.
Post Office Box 871
Tucson, Arizona 85702
Attorneys for Plaintiffs/Counterdefendants
Gates Learjet Corporation and
Gates Learjet Export Corporation

EXHIBIT A

Gates Learjet Export Corporation
p.o. box 11186 tucson, arizona 85734 (602) 294-4422 telex 666408

Mr. James Jensen, Jr., President
LEARJET PHILIPPINES, INC.
Prescon Strata 100 Building, Suite 10-H
Emerald Avenue, Pasig
Metro Manila, Philippines

Dear Mr. Jensen:

I am pleased to forward for your review and execution the International Distributor Agreement for 1980.

In the Agreement, please do not overlook Article IV, Ownership and Management, which must be filled in. As you know, the "Amendment to the International Distributor Agreement" deals with the rules that apply in the event a new aircraft is resold within the six (6) month period following its delivery by Gates Learjet Corporation or Gates Learjet Export Corporation. If the Amendment is not returned to us with an indication of either acceptance or rejection, it will be deemed to have been rejected. In other words, you will not get the benefits of this amendment unless you write in "Accepted" and sign it.

As for the Distributor Business Plan for 1980, please provide as many details as possible to enable us to properly understand your plans for 1980 in the territory for which you are responsible.

Attachments "A" and "B" set the quota and the minimum number of sales personnel deemed necessary for your

territory. Please note that for 1980 the quota includes the 50 Series aircraft.

Please return original and copy of the Distributor Agreement, properly signed, as well as the applicable attachments so that I may sign and return your copy to you. We are looking forward to working with you and trust 1980 will be a successful year for your company and ours.

Sincerely,

FIH:cl

Enclosures:

International Distributor Agreement — Original and Copy
Amendment to International Agreement — Original and Copy
Distributor Business Plan — Original and Copy
Attachment "A" and "B" — Original and Copy

EXHIBIT B

Gates Learjet Export Corporation
p.o. box 11186 tucson, arizona 85734 (602) 294-4422 telex 666408

EXHIBIT 6

March 25, 1980
Mr. James Jensen, Jr.
Learjet Philippines, Inc.
235 Montgomery Street, Suite 1626
San Francisco, CA 94104

Dear Mr .Jensen:

We are pleased to return your executed copy of the International Distributor's Agreement for 1980.

We are looking forward to working with you and trust that 1980 will continue to be a successful year for your company and ours.

Sincerely yours,
J. M. Traisnel
Manager Administration
International Marketing

njp

Enclosure

EXHIBIT C

g. Ruben Roya, employee of Learjet Philippines. Will testify as to work he did, pay he received, expenses incurred, and related matters.

h. Colonel Mendaro, employee of Learjet Philippines. Will testify as to work he did, pay he received, expenses incurred, and related matters.

i. Mr. Justimanio, employee of Learjet Philippines. Will testify as to work he did, pay he received, expenses incurred, and related matters.

j. Renairio Paras, employee of Learjet Philippines. Will testify as to work he did, pay he received, expenses incurred, and related matters.

k. Rolando Alipio, employee of Learjet Philippines. Will testify as to work he did, pay he received, expenses incurred, and related matters.

l. Benedicto Corpus, employee of Learjet Philippines. Will testify as to work he did, pay he received, expenses incurred, and related matters.

m. David Crompton, principal of Stillwell Aviation. Will testify as to Stillwell Aviation's after sale support facilities, lack of involvement of B. S. Stillwell and Stillwell Aviation lack of jurisdiction over Stillwell Aviation, and related matters.

n. Tinsay, General Manager of Judatin Training. Will testify as to reputation of Learjet Philippines and its principals, and related matters.

Dated this 24th day of May, 1983.

Exhibit C Plaintiffs Supplement Answers to Defendants 1st Set of Interrogatories dated Mar. 24, 1983.

EXHIBIT D

Plaintiffs, pursuant to Rule 26 of the Federal Rules of Civil Procedure, hereby supplement its answers to Defendants' Non-Uniform Interrogatories (1st Set) as follows:

The address of all Gates Wichita employees heretofore identified is Post Office Box 7707, Wichita, Kansas 67277, 8220 West Harry, Wichita, Kansas 67209. Any of these witnesses will be made available to Defendants for the purposes of deposition without the necessity of subpoena upon reasonable notice to Plaintiffs' counsel.

The addresses of all the Philippine witnesses are in Defendants' possession and most of them are subject to a Court Order requiring Defendants to disclose them to Plaintiffs. If this is not the case, Plaintiffs will be happy to attempt to determine the address of any witnesses which does not fall within that category.

Michael Fahey, John Benson, and Marge Taylor are Gates employees located at 6868 South Plumer in Tucson, Arizona. Larry McDonough and Bib Stillwell are Gates employees located at 7777 Old Nogales Highway, Tucson, Arizona.

Mike Menardo is an ex-Gates employee currently living at 2601 Ashe, Apartment 501, Bakersfield, California 93309.

Lewis Jones is an ex-Gates employee currently located at Cooper Laboratories, Inc., Corporate Flights Operation Department, 222 East Carillo, Suite 300, Santa Barbara, California 93401.

R. E. Claughley is an independent consultant who can be reached at Combs-Gates Denver, Stapleton International Airport, Denver, Colorado 80207.

Exhibit D Plaintiffs Supplemental Answers to Defendants 1st Set of Interrogatories dated 6/21/83.

EXHIBIT E

Plaintiffs, pursuant to Rule 26 of the Federal Rules of Civil Procedure, hereby supplement its answers to Defendants' Non-Uniform Interrogatories (1st Set) as follows:

2. a. General Ferdinand Marcos, Presidential Palace, Manila, Philippines. Will testify as to the reputation and standing of Learjet Philippines and its principals, and related matters.

b. George Kriss, Gates Learjet Tucson. Kriss is the pilot who flew from San Francisco to Honolulu in a 55 series Gates Learjet. He will testify as to the long range capabilities of these planes, and related matters.

c. James S. Mederios, Gates Learjet Tucson — Senior Vice President in charge of product support service. Will testify as to after sale plane support requirements for Gates Learjets, and related matters.

d. Ray Pahls, Gates Learjet Tucson — Manager of service facilities. Will testify as to after sale claim support requirements for Learjets, and related matters.

e. Rolando Moscardon, Manila, Philippines, Learjet Philippines' successor (Western Pacific Aviation Corporation). Will testify as to Philippine market for business jets, after sale support policy of Gates Learjet Export Corporation, reputation of Learjet Philippines and its principals, Learjet Philippines intereference with sale of Learjets, and related matters.

f. Mrs. Monlopaz, Manila, Philippines. Will testify as custodian of records for Learjet Philippines, Inc. and related matters.

Exhibt E (2 pages) Plaintiffs Supplement Answers to Defendants Interrogatories (1st Set).

g. Ruben Roya, employee of Learjet Philippines. Will testify as to work he did, pay he received, expenses incurred, and related matters.

h. Colonel Mendaro, employee of Learjet Philippines. Will testify as to work he did, pay he received, expenses incurred, and related matters.

i. Mr. Justimanio, employee of Learjet Philippines. Will testify as to work he did, pay he received, expenses incurred, and related matters.

j. Renairio Paras, employee of Learjet Philippines. Will testify as to work he did, pay he received, expenses incurred, and related matters.

k. Rolando Alipio, employee of Learjet Philippines. Will testify as to work he did, pay he received, expenses incurred, and related matters.

l. Benedicto Corpus, employee of Learjet Philippines. Will testify as to work he did, pay he received, expenses incurred, and related matters.

m. David Crompton, principal of Stillwell Aviation. Will testify as to Stillwell Aviation's after sale support facilities, lack of involvement of B. S. Stillwell and Stillwell Aviation, lack of jurisdiction over Stillwell Aviation, and related matters.

n. Tinsay, General Manager of Judatin Training. Will testify as to reputation of Learjet Philippines and its principals, and related matters.

Dated this 24th day of May, 1983.

Exhibit ____ (2 pages) Plaintiffs Supplemental Answers to Defendants Interrogatories (1st Set)

EXHIBIT F

2. Identify (ref to introductory definitions for information you must supply to identify a person) all other witnesses, who, it is contemplated, may or will be called upon to testify in this action.

1. Michael Fahey.
2. Lewis Jones.
3. Mike Menardo.
4. Larry McDonough.
5. Bib Stillwell.
6. John Benson.
7. Finn Hedlund.
8. Ricardo Tomacruz.
9. James B. Jensen, Jr.
10. Defendants Philippine attorneys.
12. Quasha/Marcos (plaintiffs' Philippine attorneys).
13. De las Alas.
14. Antonio O'Campo, Financial Center Manila.
15 Such other witnesses as a continuing investigation will disclose.

(a) The general subject upon which each such person will testify; Witnesses numbered 1, 4, 10 and 13 will testify as to corporate damage, and the attachment of the airplane in the Philippines. Witnesses numbered 5 and 6 will testify as to telephone conversations with De las Alas and Quasha regarding the attachment in the Philippines and as to corporate damage. They will also

testify as to distributorship agreements, company policy as to same, and other topics involving plaintiff's corporate matters. Witnesses numbered 2 and 3 will testify as the attachment of the plane in the Philippines and as to corporate damage. Witness number 7 will testify as to topics unknown at this time. Witnesses number 8, 9 and 11 will testify as to their role in the Philippine attachment and judicial proceeding, as well as the trademark enfringement, breach of contract and abuse of contract counts of this Complaint. Witnesses number 12 and 14 will testify as to corporate damage. Witnesses number 1, 4, and 10 will testify as to Gates Learjet distributorship agreements, corporate policy as to same, and general corporate matters.

(b) State the relationship, if any, of each witness to you; Witnesses numbered 1, 2, 3, 4, 5, and 6 are employees of plaintiff. Witness number 7 is an ex-employee of plaintiff. Witnesses number 8, 9 and 10 are ex-distributors of plaintiffs. Witness number 9 is a special sales agent for plaintiffs. Witnesses number 12 and 13 are Philippine counsel.

EXHIBIT F

EXHIBIT G

Plaintiffs, pursuant to Rule 26 of the Federal Rules of Civil Procedure, hereby supplement its answers to Defendants' Non-Uniform Interrogatories (1st Set) as follows:

2. General Hanz Menzi; Bill Vardaman (Gates-Wichita); and Ambassador Roberto S. Benedicto.

4. (d) Mockups and/or models of Gates Learjet Model 55, 55 ER, 55LR, 55 XLR and 56.

BILBY, SHOENHAIR, WARNOCK
& DOLPH, P.C.

By MICHAEL J. RUSING
P. O. Box 871
Tucson, Arizona 85702
Attorneys for Plaintiffs

Copy of the foregoing mailed
this 25th day of April, 1983,
to:
Gary F. Howard, Esq.
MOLLOY, JONES, DONAHUE, TRACHTA,
CHILDERS & MALLAMO, P.C.
P. O. Box 2268
Tucson, Arizona 85702
Attorneys for Defendants

Exhibit G Plaintiffs Supplemental Answers dated April 25, 1983, to Defendants Interrogatories (1st Set).

EXHIBIT H

(b) Identify all documents referring or relating to and/or constituting said facts.

Purchase agreement for Hamix.

3. State all facts which form the basis of the allegation in paragraph 17 of your Complaint that "[t]he defendants 'Jensen', 'Tomacruz', 'Lear Phil', 'Jensen, Inc.', and 'Hamix' conspired to make unauthorized use of the trade mark and name of the plaintiff, the use of which tends to delude and confuse the public into believing that the defendants' business is in some way connected with the business of the plaintiff." As to such conspiracy, include in your answer, in addition to all other facts, at least the following details:

Jensen, Tomacruz, and Learjet Philippines continued to use the name Learjet in litigation, letterhead, and office identification. From present information, it appears that Jensen, Tomacruz, and Learjet Philippines are the co-conspirators.

(a) When the conspiracy was formed;

EXHIBIT H Plaintiffs Answers to Defendants Interrogatories dated March 11, 1983.

EXHIBIT I

(APPROXIMATE REPRODUCTION)

LEAR MKTG TUC

ATTN: M. FAHEY

AA – AS STATED ON THE PHONE ANS. BENEDICTO _____ HAVE _____ PRACTICALLY ALL ISSUES INCLUDING PRICE _____ EXCEPT THAT HE IS UNCONVINCED ON CAPA _____ OF GLEC TO UICK _____L ON SERVICE SUPPORT.

RECOMMEND GLEC MAKING FIRM COMMITMENTS ALONG FF. IDEAS THAT WILL GO WITH DISTRIBUTOR'S OWN COMMITMENTS:

(NOTE: RSB HAS BEEN DISAPPOINTED WITH SERVICE SUPPORT FOR ANY OF THE ACFT HE OWNS WHICH INCLUDES KING AIRS, MERLI___ BELL AND EN ISLA[illegible]ER ALSO SEES ABSENCE OF IN-COUNTRY LEAR SUPPORT.)

1. GLEC TO COMMIT TO SEND ONE ENGINEER UPON DELIVERY OF RSB LEAR FOR PERIOD OF 3 MONTHS TO ASSIST SETTING UP OF SERVICE CENTER FOR LEARS AND FURTHER TRAIN DISTRIBUTOR'S MECHANICS

WM GLEC TO HAVE SERVICE REP VISIT MANILA AT LEAST ONE A YEAR OR A WEEK OR TWO FOR SERVICE DEVELOPMENT.

3. _____ IT WITH TRADERS ROYAL BANK FOR DISTRIBUTOR'S ACCOUNT AN AMOUNT OF NOT LESS THAN 50,000 US D AS INITIAL REVOLVING FUND FOR LC TO COVER URGENT OR AOS ORDERS FOR PARTS NOT IN DISTRIBUTORS STOCK. (I HAVE APPLIED WITH CB FOR THIS REVOLVING LC WITH LIMIT OF USD 50,000 PER MONTH FOR KUSH ORDERS. OFFICIALLY THIS DEPOSIT SHALL BE REPLENISHED BY DISTRIBUTOR FROM SALES INCOME. PRIVATELY THIS AMOUNT MAY BE PROVIDED BY MY PARTY.

4. GLEC TO COMMIT TO DELIVER WITHIN X HOURS FROM RECEIPT ALL URGENT ORDERS (WITH EXCEPTIONS) PROVIDED RP IMPORT REGULATIONS ARE SATISFIED BY BUYER OR DISTRIBUTOR.

5. GLEC SHALL SEE TO IT THAT DISTRIBUTOR PARTS STOCKING AND OTHER SERVICE SUPPORT OBLIGATIONS ARE DULY COMPLIED.

6. ASSURANCE THAT ASSOCIATED SERVICE CENTERS SUCH AS STILWELL IN AUSTRALIA AND GARROX Q/PRO.4) TO LEND SUPPORT AND COOPERATION TO THE RP ORGANIZATION.

BB – SUGGEST THAT COMMITMENTS BE SUPPORTED WITH BOARD APPROVAL.

CC – SUGGEST PETTY CASH FUND FOR COURT CASES BE DEPOSITED TEMPORARILY THRU CITIBANK ACCOUNT NO. 00670677 CITIBANK N.A. MAKATI, M.M. OR YOU UTILIZE FACILITIES OF INA MANILA OFFICE FOR DISBURSEMENT CONTROL AND ACCOUNTING UPON UR RETURN. MEANWHILE AM SETTLING ACCOUNTS TO DATE FOR CUSTOMS GUARDING ETC.

DD – NOW THAT SUSPICION THAT INFLUENTIAL PEOPLE ARE BEHIND JENSEN/TOMACRUZ IS VALID I STRONGLY RECOMMEND THAT LAWYERS WITH REAL CLOUT BE HIRED TO WORK WITH, IF NOT TAKE OVER FROM, CELSO. WHILE EVERYONE FEELS YOU WILL EVENTUALLY WIN BOTH CASES, DELAYS THAT OTHER SIDE SEEMS EASILY ABLE TO OBTAIN FROM THE COURT COULD CAUSE YOU MORE DAMAGE. THIS SITUATION CAN BE NEUTRALIZED BY ANOTHER HIGH LEVEL POLITICALLY STRONG LAW FIRM. WILL SEND IN NAMES WHEN NEEDED.

R.P. MOSCAR

EXHIBIT I